CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 370

FONG HAW TAN, PETITIONER,

vs.

ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1947.

CERTIORARI GRANTED NOVEMBER 10, 1947.

No. 11447

United States

Circuit Court of Appeals

For the Ninth Circuit.

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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On Appeal from United States District Court for Nothern District of California

Decision by Judge Goodman

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division

No. 25492-G

In the Matter of:

FONG HAW TAN,

on Habeas Corpus

S. F. Immigration File No. 12020/7753

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California:

The petition of Fong Haw Tan respectfully shows:

I.

That the petitioner is a native of China, having first arrived in the United States on the Steamship Korea in August, 1910, and was duly admitted for permanent residence by the United States immigration authorities for the Port of San Francisco.

II.

That following his admission by the United States as aforesaid, the petitioner has resided continuously within the United States from said date of entry up to and including the present date.

III.

That the petitioner is now in the custody of I. F. Wixon, [1*], District Director of Immigration and Naturalization for the District of San Francisco, under an Order of Deportation issued by the Attorney General of the United States on November, 1941, which said Order charged that the said petitioner was subject to deportation under the Act of February 5, 1917, in that he was after May 1, 1917, sentenced to a term of imprisonment more than once for a term of one year or more for the commission subsequent to his entry of a crime involving moral turpitude, to-wit, murder.

IV.

That the only time the petitioner has been sentenced to a term of imprisonment because of a conviction in this country of any crime involving moral turpitude was in Fresno, California, on July 21, 1925, when the petitioner was convicted of the crime of murder alleged to have been committed on May 22, 1925. That the petitioner was sentenced to a term of imprisonment for the aforesaid crime on July 21, 1925, and that he served a term in the penitentiary of the State of California and was thereafter paroled.

V.

That the petitioner, as heretofore alleged, entered the United States legally in August, 1910; that the alleged commission of the offense heretofore referred to and the sentence and imprisonment there-

* Page numbering appearing at foot of page of original certified Transcript of Record.

for occurred in 1925, or a period of more than five years after the entry of the detained into the United States.

VI.

That prior to the commission of the alleged offense set forth above the petitioner had not theretofore committed any offense whatsoever involving moral turpitude, nor had he been sentenced to a term of imprisonment because of conviction in this country of any crime involving moral turpitude.

VII.

That, therefore, the petitioner is not subject to the [2] provisions of the Act of Congress above referred to relating to the deportation of aliens who have been sentenced to a term of imprisonment because of a conviction in this country of a crime involving moral turpitude.

VIII.

That pursuant to a hearing held before said District Director of Immigration and Naturalization, said petitioner was ordered to be deported from the United States on or about May 12, 1946, the said deportation to be made on a vessel sailing from the Port of San Francisco on the said date.

IX.

That the hearings and proceedings had therein and the action of the said District Director and the said Attorney General of the United States, ordering the petitioner to be deported on May 12, 1946,

as aforesaid, was and is in excess of the powers and jurisdiction conferred upon them and is in excess of the authority committed to them by the Statutes of the United States in such cases made and provided.

X.

That your petitioner has not in his possession any part or parts of said proceedings had before said District Director for the reason that your petitioner has not been informed of the facts of this case; that the original immigration records, including the Findings and Decisions of the Attorney General, are on file with the said District Director, by reason of which the records are not now available to your petitioner; that your petitioner hereby stipulates that as soon as said records are made available the same may be filed and made a part of the proceedings herein.

XI.

That it is the intention of the said District Director to deport the said petitioner at once and, unless this Court intervenes to prevent said deportation, your petitioner will be unlawfully deprived of his residence within the United [3] States of America.

Wherefore, your petitioner prays that a writ of habeas corpus issue as prayed for, directed to the District Director of Immigration and Naturalization, and directing him to hold the body of your petitioner within the jurisdiction of this Court and to present the body of your petitioner before this Court at a time and place specified in the order, to-

gether with the time and cause of his detention, so that the same may be inquired into to the end that your petitioner may be restored to his liberty and go hence without day; and that the Court release the said petitioner upon his own recognizance during this proceeding. Your petitioner heretofore has been permitted his liberty by the United States immigration authorities on his own recognizance.

Dated: This 10th day of May, 1946.

/s/ THOMAS C. LYNCH,
/s/ WILLIAM J. CHOW,
Attorneys for Petitioner.

[Endorsed]: Filed May 10, 1946. [4]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein:

It Is Hereby Ordered, that I. F. Wixon, District Director of Immigration and Naturalization for the District of San Francisco, appear before this Court on the 27th day of May, 1946, at the hour of 10 o'clock a.m. of said day, to show cause, if any he have, why a writ of habeas corpus should not be issued as prayed for, and that a copy of this order be served upon said District Director of Immigration and Naturalization, and a copy of the petition

and said order be served upon the United States Attorney for his District, his representative herein:

And It Is Further Ordered, that Fong Haw Tan, the petitioner herein, be not removed from the jurisdiction of this Court and that he be enlarged on bond in the sum of $1,000.00 pending this hearing and until further orders herein.

Dated this 10th day of May, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed May 10, 1946. [5]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Arthur J. Phelan, as Acting District Director, United States Immigration and Naturalization Service, Port of San Francisco, California, and for cause why a writ of habeas corpus should not issue herein, shows:

I.

That the person in whose behalf the petition for writ of habeas corpus was filed, who is also known as Fong Haw (or Ho) Tan (or Ton) or Ong Ton, or Don Ton, is detained by respondent Arthur J. Phelan, as Acting District Director of United States Immigration and Naturalization Service, Port of San Francisco, California, under and by virtue of

a warrant of deportation duly and regularly issued on the 14th day of November, 1941, by the Attorney General of the United States after a hearing duly and regularly held before an Immigrant Inspector of the United States.

II.

That a true copy of said warrant of deportation and the original record of the entire proceedings pertaining thereto are annexed hereto and made a part hereof as Respondent's Exhibit "A".

Wherefore, Respondent prays that the petition for writ of habeas corpus herein be denied.

/s/ ARTHUR J. PHELAN,
Actg. District Director Immigration and Naturalization Service, Port of San Francisco, California.

[Endorsed]: Filed May 27, 1946. [6]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Upon the authority of Nishimoto v. Nagle, 44 Fed. 2d 304, Cir. 9, the petition for writ of habeas corpus is denied.

Dated: August 12, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Aug. 12, 1946. [7]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court, to I. F. Wixon, District Director of Immigration and Naturalization, and to Frank J. Hennessy, Esq., United States Attorney, his attorney:

You and each of you will please take notice that Fong Haw Tan, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered on August 12, 1946, denying the petition for a writ of habeas corpus filed herein.

Dated: September 10, 1946.

THOS. C. LYNCH,
WILLIAM J. CHOW,
Attorneys for Appellant.

[Endorsed]: Filed Sept. 10, 1946. [8]

[Title of District Court and Cause.]

PETITION FOR APPEAL

Comes now Fong Haw Tan, the appellant in the above-entitled matter, through his attorneys, Thomas C. Lynch and William J. Chow, Esqs., and respectfully shows:

That on the 12th day of August, 1946, the above-entitled Court made and entered its order denying

the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, the appellant prays that an appeal may be granted in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and further, that the said appellant be held within the jurisdiction of this Court during the pendency of the appeal herein, so that he may be produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, September 1946.

THOS. C. LYNCH,
WILLIAM J. CHOW,
Attorneys for Appellant.

[Endorsed]: Filed Sept. 10, 1946. [9]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the appellant, Fong Haw Tan, through his attorneys, Thomas C. Lynch and William J.

Chow, Esqs., and sets forth the errors he claims the above-entitled Court committed in denying his petition for a writ of habeas corpus, as follows:

I.

That the Court erred in not granting the writ of habeas corpus and discharging the appellant, Fong Haw Tan, from the custody and control of I. F. Wixon, District Director of Immigration and Naturalization Service for the Port of San Francisco.

II.

That the Court erred in not holding that it had jurisdiction to issue the writ of habeas corpus as prayed for in the petition on file herein.

III.

That the Court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in holding that a sentence to a fixed term of imprisonment of one year or more upon each of two or more counts of a single information or indictment, which sentence upon each and all of the counts of the single information or indictment was made to run concurrently, was a sentence to two or more separate and distinct terms of imprisonment of one year or more and was such

a sentence as to justify the deportation of the appellant. [10]

V.

That the Court erred in not holding that a sentence to a fixed term of imprisonment of one year or more upon each of two or more counts of a single information or indictment, which sentence upon each and all of the counts of the single information or indictment was made to run concurrently, was not a sentence to two or more separate and distinct terms of imprisonment of one year or more and was not such a sentence as to justify the deportation of the appellant.

VI.

That the Court erred in holding that a sentence to a term of life imprisonment upon each of the two counts of a single information or indictment, which sentence upon each and both of the counts of the single information or indictment was by operation of law made to run concurrently, was a sentence to two separate and distinct terms of imprisonment of one year or more and was such a sentence as to justify the deportation of the appellant.

VII.

That the Court erred in not holding that a sentence to a term of life imprisonment upon each of the two counts of a single information or indictment, which sentence upon each and both of the counts of the single information or indictment was

by operation or law made to run concurrently, was not a sentence to two separate and distinct terms of imprisonment of one year or more and was not a sentence as to justify the deportation of the appellant.

VIII.

That the Court erred in holding that the appellant had been sentenced more than once to a term of imprisonment of one year or more because of conviction of a crime or crimes involving moral turpitude within the meaning of the Immigration [11] Act of February 5, 1917, Section 19, (Section 155(a) Title 8 U.S.C.A.).

IX.

That the Court erred in not holding that the appellant had not been sentenced more than once to a term of imprisonment of one year or more because of conviction of a crime or crimes involving moral turpitude within the meaning of Immigration Act of February 5, 1917, Section 19, (Section 155(a) Title 8 U.S.C.A.).

Wherefore, appellant prays that the said order and judgment of the United States District Court for the Northern District of California made, given and entered herein in the office of the Clerk of said Court on the 12th day of August, 1946, denying the petition for a writ of habeas corpus, be reversed and that he be restored to his liberty and go hence without day.

Dated at San Francisco, California, September .., 1946.

THOS. C. LYNCH,
WILLIAM J. CHOW,
Attorneys for Appellant.

[Endorsed]: Filed Sept. 10, 1946. [12]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It appearing to the above-entitled Court that Fong Haw Tan, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court for the Ninth Circuit from the judgment and order of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor,

It is hereby ordered that an appeal be and the same is hereby allowed as prayed for herein; and

It is hereby further ordered that the Clerk of the above-entitled Court make and prepare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

It is further ordered that the execution of the

warrant of deportation of the said Fong Haw Tan, the petitioner herein be and the same is hereby stayed pending this appeal; that he be not removed from the jurisdiction of this Court pending this appeal and that he be enlarged on bond in the amount of One Thousand ($1,000.00) Dollars pending this appeal.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 12, 1946. [13]

[Title of District Court and Cause.]

ORDER FIXING BOND ON APPEAL

It appearing that the petitioner has filed notice of appeal to the United States Circuit Court for the Ninth Circuit from the judgment and order entered in the above-entitled cause on August 12, 1946,

It is ordered that the amount of cost bond on said appeal herein be and hereby is fixed in the sum of Two Hundred and Fifty ($50.00) Dollars, conditioned as required by law and rule of this Court.

Dated: September 12th, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 12, 1946. [14]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS

An appeal having been taken from an Order denying a petition for a writ of habeas corpus in the above-entitled cause.

It Is Hereby Ordered that the Immigration Records filed as exhibits herein, may be transmitted by the Clerk of the above-entitled Court to and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be taken as a part of the record on appeal in the above-entitled cause with the same force and effect as if embodied in the transcript of record and so certified by the Clerk of this Court.

Dated: September 12th, 1946.

LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Sept. 12, 1946. [15]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above-entitled Court:

Sir:

Please issue copies of following papers for transcript on appeal:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.

3. Return to Order to Show Cause.
4. Order denying petition for writ of habeas corpus.
5. Notice of Appeal.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal. [16]
9. Order fixing bond on appeal.
10. Order transmitting original exhibits.
11. Praecipe.

/s/ WILLIAM J. CHOW,
/s/ THOS. C. LYNCH,
Attorneys for the Appellant.

[Endorsed]: Filed Oct. 7, 1946. [17]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 17 pages numbered from 1 to 17, inclusive, contain a true, full, and correct transcript of the records and proceedings in the matter of Fong Haw Tan, on Habeas Corpus, No. 25492 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of $5.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 17th day of October A. D. 1946.

C. W. CALBREATH,
Clerk.

[Seal] /s/ E. H. NORMAN,
Deputy Clerk. [18]

In the United States Circuit Court of Appeals
for the Ninth District

Case No. 11447

FONG HAW TAN,

Appellant,

vs.

I. F. WIXON, District Director of U. S. Immigration Service,

Appellee.

DESIGNATION OF POINTS RELIED ON BY APPELLANT ON APPEAL

Comes now, Fong Haw Tan, the appellant in the above-entitled matter, through his attorneys, pursuant to rule 19, subdivision 6, of the rules of this court, hereby designates and states that he adopts

as his points to be relied on on appeal each and every one of the assignments of error included in the petition for review.

/s/ THOS. C. LYNCH
/s/ WILLIAM J. CHOW

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF THE RECORD ON APPEAL THAT IS TO BE PRINTED

Comes now Fong Haw Tan, the appellant in the above-entitled matter, through his attorneys, Thomas C. Lynch and William J. Chow, Esqs., pursuant to rule 19, paragraph 6, of the rules of this court designates the part of the record on appeal to be printed as follows:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Return to Order to Show Cause, including Exhibit "A" attached thereto.
4. Order Denying Petition for Writ of Habeas Corpus.
5. Notice of Appeal.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal.
9. Order Fixing Bond on Appeal.

10. Order Transmitting Original Exhibits.
11. Praecipe.

/s/ THOMAS C. LYNCH,
/s/ WILLIAM J. CHOW,
Attorneys for Appellant.

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the foregoing appellant's Designation of Parts of the Record on Appeal that is to be printed.

/s/ FRANK J. HENNESSY,
U. S. Attorney,

/s/ EDGAR R. BONSALL,
Asst. U. S. Atty.,
Attorneys for Appellee.

[Endorsed]: No. 11447. United States Circuit Court of Appeals for the Ninth Circuit. Fong Haw Tan, Appellant, vs. Arthur J. Phelan, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 17, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11447

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

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PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Friday,
May 16, 1947

Before: Stephens, Healy and Orr,
Circuit Judges

ORDER OF SUBMISSION

On Motion of Mr. Edgar Bonsell, Assistant United States Attorney, counsel for appellee, Ordered appeal herein submitted to the Court for consideration and decision on briefs on file.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Wednesday,
June 25, 1947

Before: Stephens, Healy and Orr,
Circuit Judges

ORDER DIRECTING FILING OF OPINION AND CONCURRING OPINION AND FILING AND RECORDING OF DECREE

Ordered that the typewritten opinion and concurring opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11,447

June 25, 1947

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before: Stephens, Healy and Orr, Circuit Judges.

Stephens, Circuit Judge.

OPINION AND CONCURRING OPINION

Fong Haw Tan seeks release from custody of the acting District Director, Immigration and Naturalization Service, Port of San Francisco, California, by habeas corpus proceedings. After issuance of a show cause order, the court dismissed the petition, and petitioner appeals.

Appellant, a native of China, was admitted into this country in August, 1910, as a permanent resi-

dent, and has resided here ever since. On June 11, 1925, he was indicted for the murder of two persons in separate counts of the same bill. Therein he was charged with having committed both crimes on May 22, 1925. He was convicted on both counts by the same jury on July 25, 1925. Thereafter, a distinct and separate sentence of imprisonment in the state penitentiary for the term of his natural life was pronounced upon him upon each conviction. Both crimes involved moral turpitude. The point for decision involves construction of 8 U.S.C.A. § 155(a), the relevant part of which is set out in the margin.[1]

The Director claims that appellant has been sentenced twice in the circumstances required by the statute for deportation, while appellant claims that, giving full weight to the purpose of the act, he has been sentenced but once, and hence, having resided here more than five years before the crimes were committed, he is not subject to deportation.

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[1] 8 U.S.C.A. § 155(a): "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term if imprisonment, because of conviction in this country of any crime involving moral turpitude committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."

There were, as has been seen, two pronouncements of sentence upon two verdicts of guilty. Both were for imprisonment for life. In the nature of things the sentence cannot be served twice; hence, says appellant, there was but one sentence to serve.

The primary fault with appellant's reasoning is that the service of the sentence is taken as the basis for applying the statute, while nothing is said in the statute about service of the sentence. What the Congress had in mind was that one who accepts the hospitality of this free country should not violate its laws. After five law-abiding years, one law infraction of the nature defined in the statute would not be taken as wholly unfitting the alien for continued residence, but two or more such infractions would do so. It thus happens that deportation results from and because of the commission of the base deed. The sentence is but the official seal that the crime was committed by the alien.

The exact point was given close analysis by this court in Nishimoto v. Nagle, 44 Fed. 2d 304, and at p. 306 said: "The purpose of Congress undoubtedly was to provide for the deportation of a man who committed more than one offense involving moral turpitude for which he had been convicted and upon which conviction and sentence has been impressed; whether the sentences run concurrently or consecutively is entirely immaterial from the standpoint of the purpose of the law." Appellant, however, does not present his point without high authority, for, in considering the question where conviction

had been had on more than one count for arson and the same term of imprisonment had been adjudged for each count, all to run concurrently, the second circuit court said: "* * * it is a fiction to regard the covering of several offenses by a single penalty, as the imposition of the same imprisonment anew each time. Punishment consists of the pains endured, and the lapse of the term ends these; they cannot be exacted a second time." United States ex rel. Magnizzi v. Day, 51 Fed. 2d 1019, at 1021.

No exception to the philosophical statement can be taken, but giving it full application to the statute, we think it does not at all follow that an alien who has twice offended is not subject to deportation. It appears that the court was bearing too heavily upon what service of the sentences means to the convict. If the deportation was based upon the suffering the sentenced one must endure, then we would readily concede that in the service of cumulative sentences deportation would be based upon a fiction. But, as we have already said, the basis for the deportation is the alien's infraction of our laws.

Illustrations are given in the Magnizzi case of possible single offenses under the narcotic laws and counterfeit laws, which may result in multiple convictions of crimes and consequent sentences which would subject the guilty one to deportation. But these, in our opinion, do no more than to impose upon the trial judge an additional element for consideration in his tremendous responsibility of measuring justly due penalties.

Judge Sibley in Opolich v. Fluckey, 47 Fed. 2d 950, expresses his opinion on the point under consideration to the effect that concurring sentences pronounced for several related crimes closely connected in time as to their commission should be considered as one sentence. He interprets the purpose of the statute as one to rid the country of aliens who are habitual criminals. He says: "Technically he (the convict) committed four crimes, notwithstanding they were connected together and apparently in the same scheme of counterfeiting." The plurality of the pronouncement of sentences, each the same and all running concurrently, he deducts, is not proof of habitual criminality, and, therefore, such cases are not within the statute. The conclusion reached by this eminent jurist certainly presents difficulties: By what formula shall the permissible lapse of time between crimes be measured? How close must the crimes be related to each other? Must they derive from the same impulse? Do separate crimes of different natures committed to clear the way for a main objective come within the conclusion? The statute answers none of these obtruding questions.

It cannot be doubted that Congress desired to end our hospitality to aliens of criminal tendency, and supplementary to our penal laws, it notified them that they must obey our laws or be put out. In our opinion there is no harsh injustice involved that justifies a judicial search for a limitation of the plainly expressed scope of the statute. Within five

years of entry, one base act of the alien ends his permissive stay; after five years two base acts ends it.

Tassrai v. Schucker, 53 Fed. 2d 570, and Clark v. Okabona, 59 Fed. 2d 187, are in accord with our view. The latter case fully analyzes the Nishimoto and Magnizzi cases and follows the former.

Affirmed.

Healy, Circuit Judge, Concurring.

I have serious doubts whether Congress intended the deportation statute to apply to a case like this. I concur in the affirmance only for the reason that this court, in Nishimoto v. Nagle, 44 F. 2d 304, has already decided the point, and should, until higher authority has spoken, follow that decision.

[Endorsed]: Opinion and Concurring Opinion. Filed Jan. 25, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11447

FONG HAW TAN,

Appellant,

vs.

ARTHUR J. PHELAN, Etc.,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered June 25, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty (30) pages, numbered from and including 1 to and including thirty, to be a full, true and correct copy of the entire record together with original immigration file, transmitted herewith of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 18th day of July, 1947.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 10, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3617)

FILE COPY

In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
SEP 24 1947
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1947

No. 370

FONG HAW TAN,
Petitioner,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

LAMBERT O'DONNELL,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
OF THE
United States

OTOBER TERM, 1947

No.

FONG HAW TAN, *Petitioner,*

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Fong Haw Tan respectfully shows:

OPINION BELOW.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Ninth Circuit is incorporated in the transcript of record (pp. 24 to 29).

JURISDICTION.

The judgment sought to be reviewed was entered on the 25th day of June, 1947 (Tr. p. 30). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF FACTS.

The petitioner is a native of China. On April 13, 1910, he arrived in the United States at the Port of San Francisco, on the SS "Korea" and was admitted for permanent residence. He resided continuously from that date of entry until the present time. On June 11, 1925, an indictment was returned against him, charging him with the murder of two Chinese on May 22, 1925, in Fresno, California. On July 21, 1925, he was convicted of both counts in said indictment and the jury in its findings recommended that the punishment be life imprisonment on each count. The Court so sentenced the petitioner. The petitioner was taken into custody by the United States Immigration and Naturalization Service under a warrant of deportation dated November 14, 1941, issued in pursuance of the provisions of Section

155(a), Title 8, U.S.C.A. After a hearing, the United States Immigration Inspector found that the petitioner was subject to deportation in that the petitioner has been sentenced twice in the circumstances required by the statute for deportation. On review, the Board of Immigration Appeals sustained the action of the said immigration inspector and ordered the issuance of the warrant for the petitioner's deportation. His petition before the United States District Court for the Northern District of California, Southern Division, was denied and, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the order dismissing the petition was affirmed (Tr. p. 30).

QUESTION PRESENTED.

Whether or not an alien, who shot and killed two persons at the same time and under the same impulse and was thereupon convicted on two counts in a single indictment and sentenced to a term of life imprisonment on each count, has been "sentenced more than once" within the contemplation, intent and purpose of Section 155(a) of Title 8, U.S.C.A.

STATUTE INVOLVED.

Section 155(a), Title 8, U.S.C.A., provides, as follows:

> "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of

conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."

REASONS RELIED ON FOR THE GRANTING OF THE PETITION.

(a) Conflict of decisions.

Because the question presented involves a conflict of decisions in the various Circuit Courts of Appeals, it is earnestly submitted that the petition should be granted.

Dated, San Francisco, California,
September 22, 1947.

LAMBERT O'DONNELL,
WILLIAM J. CHOW,
THOMAS C. LYNCH,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No.

FONG HAW TAN,
Petitioner,

vs.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California,
Respondent.

BRIEF IN SUPPORT OF PETITION.

JURISDICTION.

The statutory provision sustaining the jurisdiction of this Court to allow the writ of certiorari is contained in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF PROCEEDINGS.

(a) A petition for a writ of habeas corpus was filed in the District Court for the Northern District of California on May 10, 1946 (Tr. pp. 2 to 6).

(b) The judgment and order of the District Court denying the petition for a writ of habeas corpus was filed and entered on August 12, 1946 (Tr. p. 8).

(c) The opinion of the Circuit Court of Appeals for the Ninth Circuit was rendered and filed on June 25, 1947 (Tr. p. 24).

(d) The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered and filed on June 25, 1947 (Tr. p. 30).

(e) No petition for rehearing was filed.

The judgment of the Circuit Court of Appeals in habeas corpus proceedings is a final judgment.

STATEMENT OF THE CASE.

The proceeding is in habeas corpus and was commenced for the purpose of obtaining the discharge of the petitioner from the custody of the respondent, who, upon orders contained in a warrant for the petitioner's deportation dated November 14, 1941, was holding the petitioner for deportation to China.

The petitioner had been taken into custody by reason of the fact that he had been charged in Fresno, California, in an indictment with two separate acts of murder, in the first count with the murder of

Lai Quan, and in the second with the murder of Ong Kim. After his conviction, and on July 21, 1925, he was given separate sentences of life imprisonment on each of the two counts. The appellant was taken into custody by appropriate officials of the United States Immigration and Naturalization Service under warrant for his deportation dated November 14, 1941, issued in pursuance of the provisions of Section 155(a), Title 8, U.S.C.A. In accordance with Rule 18 of the Immigration Rules of July 1, 1925, he was given a hearing on September 12, 1925, and also on January 18, 1926, before a United States Immigrant Inspector. As a result of these hearings the officer found that appellant was subject to deportation under Section 155(a), Title 8, U.S.C.A., reading as follows:

> "* * * except as hereinafter provided, any alien, who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * *."
>
> * * * * * * *
>
> "The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deporta-

tion be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter. * * *"

On review by the Board of Immigration Appeals, his action was sustained and an order entered directing the issuance of the warrant for his deportation, and under which warrant he has been held.

ARGUMENT.

JUDICIAL INTERPRETATION.

There is plain conflict in the various circuits as to the proper interpretation of the phrase "sentenced more than once". The Circuit Courts of Appeals for the First, Second, Fourth, Fifth, and Ninth Circuits have all endeavored to construe the quoted portion of the statute; and in some instances, even in the same circuit, the decisions appear to be in some conflict. In what might be called the first leading case, *Johnson v. U. S. ex rel. Pepe,* 28 F. (2d) 810 (C.C.A. 2, 1928), the Court held that the phrase meant or refers to the number of separate crimes for which sentences are imposed; and while it expressly affirmed this prior holding in the later case of *U. S. ex rel. Mignozzi v. Day,* 51 F. (2d) 1019 (1931), that Court further held that "it is the duplication of

penalties which counts". So that Mignozzi was held not to have been sentenced more than once for deportation purposes even though there were two indictments (one indictment in one count, the other indictment containing two counts), and even though, procedurally, the general sentence to a term of seven years is actually a separate sentence upon each indictment and each count thereof. Further, the same Court did not follow its own line of distinction in affirming the order of the District Court, sustaining a writ of habeas corpus, in *U. S. ex rel. Turco v. Commissioner of Immigration,* 58 F. (2d) 1087, where Turco had been sentenced to a term of two years' imprisonment on each one of seven counts of an indictment for a like number of separate offenses of possession of, or passing, counterfeit money, the sentences being made to run *consecutively,* although the Court purported to take this action in a *per curiam* decision on the authority of *Mignozzi v. Day,* supra.

In 1931, the Ninth Circuit Court of Appeals, in the case of *Nishimoto v. Nagle,* 44 F. (2d) 304, in the most broad interpretation of the phrase "sentenced more than once" yet rendered by any Court, held that the commission of more than one crime involving moral turpitude, conviction thereof, and imposition of sentence whether or not to run concurrently or consecutively, met the purpose of the deportation statute. And this interpretation is applied in the instant case despite the serious doubts of the minority, concurring opinion that Congress intended the deportation statute to apply to such a case as the instant one.

The Fourth Circuit Court of Appeals, in 1931, confronted the problem in the case of *Tassari v. Schmucker*, 53 F. 2d 570; and after an effort to reconcile the decisions in the *Mignozzi, Pepe* and *Nishimoto* cases, supra, held that the crimes involved must be "separate and distinct", and that the sentence must be "a separate sentence for each offense" to be within the meaning of the statute, whether or not to run concurrently or consecutively.

All of the foregoing, cited cases had been reported when, in 1932, the First Circuit Court of Appeals, in the case of *Clark v. Orabona*, 59 F. 2d 187, held that the shootings of two persons by the defendant, nearly simultaneous, followed by two separate indictments, conviction and two separate sentences, brought him within the deportation statute. But the Court specially pointed out that there "is no evidence that the offenses * * * were not the result of *separate voluntary acts,*" and thus there was compliance with the statute, as there was sentence for "separate offenses." Clearly, had there not been "separate voluntary acts," resulting in "separate offenses" and "separate sentences," the Court's view would have been otherwise. So that it was upon this particular shade or degree of opinion upon which this Court passed in denying the petition for certiorari, 287 U. S. 629.

However, in the following year (1933), the Circuit Court of Appeals for the Fifth Circuit considered the problem in *Wallis v. Tecchio*, 65 F. 2d 250. There, the alien had committed at least four counterfeiting

offenses within a period of several weeks, and had been convicted on an indictment containing four separate counts. The sentence on the first two counts was to a term of imprisonment for two years, on each, the sentences to run consecutively; and on the remaining two counts, for two years, to run concurrently with the first two. The Court held that this did not amount to being "sentenced more than once" for deportation purposes; and, in brief, that a sentencing at the same time for two crimes was not enough—two prosecutions and two separate sentences were necessary, at different times. Note that this decision followed that of the District Court in *Opolich v. Fluckey*, 47 F. 2d 950 (1930) where, after conviction on a four count counterfeiting indictment, there had been a sentence of two years on each count, to run concurrently; the Court holding that there had to be separate sentences more than one time, and that "Congress had in mind what are commonly called 'repeaters', that is to say, persons who commit a crime and are sentenced, and then commit another and are sentenced again."

In 1935, on the authority of *Mignozzi v. Day*, supra, the Circuit Court of Appeals, 2nd Circuit, reversed an order of the District Court in the case of *U. S. ex. rel. Guerricia v. Reimer*, 79 F. 2d 1019, and held against deportation of an alien who had been convicted of the commission of two separate and distinct robberies and one assault with intent to kill, all the victims being different persons, being sentenced to terms of imprisonment of more than one year in each case; the crimes

had all been committed within a period of about two weeks. In a similar case, *U. S. ex. rel. Babac v. Perkins*, D.C.W.D. Pennsylvania, January, 1936 (unreported) a similar result was reached. Likewise, in *U. S. ex rel. LaGrutta v. Hughes*, D.C.D.N.J. 1938, the felon had been charged in separate indictments with, and convicted of, sex offenses committed against different little girls, on at least two distinct and separate occasions; there was a separate sentence on each indictment to a term of imprisonment of from three to five years, the second to run concurrently with the first. The District Court held that this was not "sentenced more than once" under the deportation statute and sustained a writ of habeas corpus; ordering LaGrutta's release.

It must be observed, of course, that in the *Tecchio* and *Guerricia* cases, supra, the Government did not petition the Supreme Court to grant writs of certiorari to the Circuit Courts of Appeal, although the interpretation of the statute reached a result directly contrary to that in the *Orabona* case, supra; and in the *Babac* and *LaGrutta* cases, the Government took no appeals to the Circuit Courts of Appeals—even though the rulings in those cases were at direct odds with that in the *Orabona* case; from which it may be concluded that the then Solicitors-General agreed, then, with the conclusions reached in those cases and did not wish to have those decisions disturbed.

Following the decision in the *Tecchio* case, supra, the Government abandoned any right to file with this Court any petition which would have sought to review

that decision; and a new administrative interpretation of the law, consistent with the ruling in the *Tecchio* case, became the new policy in the administrative decision of all deportation cases falling under the section in question. This policy was to the effect that there must have been at least two separate and distinct crimes committed, two separate and distinct prosecutions therefor and two separate and distinct sentences, at different times, as prerequisites to an order of deportation. Moreover, following the decision in the *Tecchio* case, administrative rulings in some deportation cases held that there must have been service of the term of imprisonment for the first crime before the second crime was committed, or that the second crime must have been committed after sentence for the first, before the condition laid down by the statute could be met. Further, deportation was not ordered where, by a single course of criminal conduct, an alien's offenses were multiplied into numerous counts of an indictment, or different indictments, with separate sentences on counts or indictments at one time.

Such administrative interpretations were followed from about the time of decision of the *Tecchio* case, supra (or about 1933), until about 1944. The administrative interpretation of the statute over so long a period of time, and consistent application of that interpretation to cases arising during that period, is entitled to great weight in determining the meaning of the statute.

THE LEGISLATIVE HISTORY.

The fact of the quite wide divergence of judicial opinion—inherent in the very concurring, minority opinion of the court below in this case—demonstrates that the statute is so ambiguously worded as to warrant reference to the reports of the proceedings in the Congress prior to its passage, as some index of legislative intent. The portion of the section directly in discussion was a provision which was added, as an amendment, to the bill while it was under debate on the floor of the House of Representatives (Cong. Rec. Vol. 53, pp. 5167-5168). Perhaps the principal and most material phase of the debate in this connection is the statement of Representative Burnett, who was in charge of the bill on the floor of the House, and who spoke in favor of the amendment, which had been proposed by Representative Sabath:

> "But the suggestion was then made by the gentleman from Illinois (Mr. Sabath) that those *who committed a second crime* involving moral turpitude showed then *a criminal heart and a criminal tendency,* and they should *then* be deported; and the committee unanimously agreed with the gentleman that that ought to be done. The police commissioner wrote me a letter in which he stated that upon examinations of the prison records he found that there were a great many of those cases, *of men who served out their sentences and then renewed their careers of crime.*" (Italics supplied.)

Speaking of his own amendment, Representative Sabath said:

"My amendment provides that after a *second offense* committed by such an alien, or where he has been for the *second time convicted*, the five year limitation should not apply. In other words, even though he may have been residing in the United States for five years or more, if he is *for the second time convicted* of any offense of or crime involving moral turpitude, he should be deported." (Italics supplied.)

The most cursory analysis of these statements indicates clearly that the Representatives responsible for the introduction of the amendment and the passage of the bill as amended had in mind that the alien who was *a second offender* should be deported—aliens who committed "a second crime" after having committed the first, who were confirmed criminals, who served out the first sentence and then "renewed their careers of crime" and were for "a second time convicted."

Moreover, the Senate adopted the view of the House, for in Report No. 352, 64th Congress, 1st Sess. p. 15, the Senate referred to the proceedings in the House as reported in the Congressional Record (wherein the amendment had been made and the statements of its proponents, interpreting it, had been reported), and referred to the provisions of the amendment as "intended to reach the alien who after entry shows himself to be a criminal of the *confirmed type*, such aliens to be deported without limitation on the length of time after entry when they commit *a second* serious offense." Again is carried through the idea of the commission of a *first* offense, the service

of sentence, freedom and then the *second* offense and punishment, with deportation added to rid the country of the "confirmed" criminal, the "repeater."

Plainly, the judicial interpretations which most nearly square with the Congressional intent, as plainly indicated by the statements, all of the statements made in either House or Senate relative to the section, are those of the District Court in the case of *Opolich v. Fluckey,* supra, and *Wallis v. Tecchio*; and just as truly did the former administrative interpretation, which followed the *Tecchio* case, coincide with the views of those in the Congress responsible for the enactment of the provision in question.

As has been hereinbefore set forth, the decisions of the various circuits are definitely in conflict and those decisions which appear to be opposed to the position of the petitioner are not in accord with the expressed opinions of those legislators who proposed and explained the amendment and its purpose.

The present contention of the petitioner Fong Haw Tan is not the product of artificial reasoning or straining to fit facts to reported decisions. The record shows that he was indicted and tried for the murder of two Chinese. This event occurred on May 22, 1925, in Fresno, California. It is admitted by the petitioner that the killing of two persons at the same time or even at the same instant constitutes separate indictable offenses and just as certainly such action may also present the opportunity of indicting the offender for the separate offenses of possessing and discharging firearms.

The Ninth Circuit Court of Appeals, in its opinion in the instant case states in part as follows: "Tassari vs. Schmucker, 53 Fed. (2) 570, and Clark vs. Orabona, 59 Fed. (2) 187, are in accord with our view." This statement we must respectfully challenge and distinguish, for it contains the implied statement that the cases cited are in accord with the case of your petitioner. An examination of the cases shows otherwise. In the *Tassari* case we find from an examination of the opinion on page 571 that Tassari was sentenced at one time for two separate and distinct crimes, one of which was committed on November 16, 1917, and the other over two months later on January 18, 1918. *Clark v. Orabona* we have already discussed.

Perhaps the Honorable Circuit Court of Appeals feels constrained to follow its own opinion in *Nishimoto v. Nagle* but, in doing so, it merely reiterates its position and does not attempt to resolve the conflict of authority. The best expression of its position may be found in the Court itself where Judge Healy in his concurring opinion says: *"I have serious doubts whether Congress intended the deportation statute to apply to a case like this.* I concur in the affirmance only for the reason that this court in *Nishimoto v. Nagle,* 44 Fed. (2) 304, has already decided the point, and should, until higher authority has spoken, follow that decision."

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted and that this Court should review the decision herein of the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
September 22, 1947.

LAMBERT O'DONNELL,
WILLIAM J. CHOW,
THOMAS C. LYNCH,
Counsel for Petitioner.

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CLERK

No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1947

FONG HAW TAN, PETITIONER

v.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 370

FONG HAW TAN, PETITIONER

v.

ARTHUR J. PHELAN, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals and the concurring opinion (R. 24-29) are reported at 162 F. 2d 663.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 25, 1947 (R. 30). The petition for writ of certiorari was filed September 24, 1947. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an alien, resident in this country for more than five years, having been convicted of the crime of murder of the first degree on two separate counts of a single indictment, committed on the same occasion, who has received a sentence to a term of life imprisonment, is subject to deportation within the meaning of Section 19 (a) of the Immigration Act of 1917, as one who has been "sentenced more than once" to a term of imprisonment for one year or more because of conviction of any crime involving moral turpitude.

STATUTE INVOLVED

Section 19 (a) of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889 (8 U.S.C.A. 155(a)) provides in part:

> Sec. 19 (a) * * * except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such depor-

tation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; * * *.

STATEMENT OF FACT

Petitioner was detained by the respondent under a deportation order; a petition for a writ of habeas corpus was filed to test the legality of that order. The District Court denied the petition; the Circuit Court of Appeals affirmed that action, 162 F. 2d 663. The case is before this Court on a petition for a writ of certiorari, which was granted on November 10, 1947.

The petitioner is a citizen of China.[1] In 1910, then aged sixteen, he was lawfully admitted into the United States for permanent residence. He has resided in the United States continuously since that time. In June, 1925, an indictment in two counts was returned in the Superior Court, Fresno, California, charging petitioner (under the name Ong Ton) with the murder of two persons on the same day, May 22, 1925, in Fresno. Petitioner was found guilty on both counts and, under the California system [2] the jury fixed the punishment

[1] Certain of the facts are found in the original record of the Immigration and Naturalization Service relating to the petitioner, an exhibit filed with the Clerk of this Court.

[2] California Penal Code, Sec. 190.

at life imprisonment on each count. The judgment of the Superior Court, after reciting the proceedings, including the verdicts of the jury on each count of the indictment, contains the sentence as follows:

> It is Therefore ORDERED, ADJUDGED and DECREED, That the said Ong Ton be punished by imprisonment in the State Prison of the State of California at San Quentin for a period of his natural life, or until legally discharged.

The petitioner was thereafter incarcerated at San Quentin. While so incarcerated, his case was investigated by the immigration authorities, which resulted, in September, 1925, in the issuance of an immigration warrant for his arrest charging that petitioner "has been *sentenced*, subsequent to May 1, 1917, *to imprisonment more than once* for a term of one year or more for the commission subsequent to his entry of a crime involving moral turpitude," and should show cause why he was not deportable. A hearing was held by an immigrant inspector at San Quentin; petitioner was not represented by counsel and was reported to have waived representation by counsel. The inspector thereafter recommended that the petitioner be deported; and the case came to the Secretary of Labor for decision. Upon consideration by the then "Secretary's and Commissioner General's Board of Review," in March, 1926, that Board found:

> Fong Haw Tan is shown to have been admitted to the United States as indicated in the caption hereof. He is now serving *two sentences of life imprisonment* having been convicted under two counts in an indictment,

each count having charged him with having murdered a human being, and each count naming a different person as the one murdered.

It is recommended that, when released from prison, Fong Haw (Ho) Tan (Ton) alias Ong Ton, be deported to China at Government expense on the grounds stated in the warrant for his arrest. (Emphasis supplied.)

This finding and recommendation was approved by the Second Assistant Secretary of Labor who, on March 20, 1926, issued a warrant of deportation ordering the petitioner's deportation to China on the same ground charged in the warrant of arrest; it was further ordered that execution of the warrant of deportation be deferred until petitioner had been released from prison. On November 14, 1941, an official of the Department of Justice [3] issued an amended warrant of deportation in substantially identical terms as the first one.

Petitioner was released from San Quentin on February 18, 1942, into the custody of the Immigration Service; deportation to China being then impossible, he was released on his own recognizance. Petitioner remained at large until 1946, when he was again taken into custody by the Immigration Service for deportation to China. Filing of the habeas corpus petition followed.

The District Court denial of the petition for habeas corpus relied "Upon the authority of Nishimoto v. Nagle, 44 Fed. 2d 304, Cir. 9," (R. 8)

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[3] The Immigration and Naturalization Service was transferred to the jurisdiction of the Department of Justice on June 14, 1940.

which is the gist of the Circuit Court opinion. In affirming the judgment of the District Court (R. 30), however, in a concurring opinion, Healy, C. J., said:

> I have serious doubts whether Congress intended the deportation statute to apply to a case like this. I concur in the affirmance only for the reason that this court, in Nishimoto v. Nagle, 44 F. 2d 304, has already decided the point, and should, until higher authority has spoken, follow that decision.

ARGUMENT

Summary of Argument

Point 1. The decision below is contrary to and in conflict with prior federal court decisions, and contrary to the weight of authority.

Point 2. The statute is ambiguous, and the legislative history shows that Congress did not intend that deportation should follow from a sentence imposed in the circumstances of this case.

Point 1

CONFLICT WITH PRIOR FEDERAL COURT DECISIONS AND WEIGHT OF AUTHORITY.

Other than for its own pronouncement in *Nishimoto* v. *Nagle*, 44 F. 2d 304, the decision of the court below is in some conflict with all of the several decisions rendered by other federal courts, and contrary to the weight of authority. The court below erred, first, in holding that there was a "distinct and separate sentence of imprisonment" (R. 25), or "two pronouncements of sentence upon two verdicts of guilty" (R. 26), whereas respondent's original Exhibit A, filed with the return to order

to show cause (R. 8), shows that *a life sentence* was imposed by the trial court on the separate verdicts of the jury. The court below may have ignored this salient fact because it stressed the view that "deportation results from and because of the *commission* of the base deed" (R. 26); and in the *Nishimoto* case, 44 F. 2d 304, 306, said: "* * * the statute does not limit the power of deportation to a second conviction, but is based upon the *commission* of a number of offenses for which the alien has been sentenced." It is the position of the petitioner that this is the root of the error of the lower court's decision; wherein the court has relied upon the *commission* of offenses, rather than the *sentencing* after conviction, as the test of deportability; and a careful analysis of the cases in other circuits shows that the instant and Nishimoto decisions stand alone.

There are four reported cases construing the statute in the Circuit Court of Appeals, Second Circuit. In the first, *Johnson* v. *United States ex rel. Pepe*, 28 F. 2d 810, the alien pleaded guilty to an information charging arson, in nine counts, which charged distinct offenses of arson committed on different dates and at different buildings; he was sentenced to confinement at hard labor for a term of one year or more *on each of four counts*, the sentences to run *consecutively*. The District Court held, 26 F. 2d 288, that the deportation statute required that *the act of sentencing be performed more than once*, and ordered relator's discharge. In reversing, the Circuit Court held (p. 811):

> In its natural and reasonable meaning "sentenced more than once to such a term of imprisonment" refers to the number of separate crimes *for which sentences are imposed*, not the form of the indictment or the procedure of a single trial. (Emphasis supplied.)

Clearly this result could not have been reached had there been a single sentence.

The second case in the Second Circuit, *United States ex rel. Mignozzi* v. *Day*, 51 F. 2d 1019, involved an alien who pleaded guilty to two indictments, one in a single count, the other in two counts, charging separate offenses for counterfeiting violations committed at two different times, and was sentenced generally by the District Court to a term of seven years, the "sentence to run concurrently." The Circuit Court, though purporting to adhere to its decision in the Johnson case, specifically held that a judge must actually "twice" sentence the alien to imprisonment for one year to support a deportation order. The gist of the reasoning of L. Hand, *C.* J., is this (p. 1021):

> It is the duplication of penalties which counts; and the test of these is practical, not procedural.

And directed the relator's release.

The two later cases were decided *per curiam* by the Second Circuit Court of Appeals on the authority of *Mignozzi* v. *Day*, 51 F. 2d 1019. In the first, *Turco* v. *Commissioner of Immigration*, 58 F. 2d 1087 (1932), Turco had been sentenced to a term of two years' imprisonment on each one of seven counts of an indictment for a like number of separate offenses of possession of, or passing, counterfeit money; the sentences were made to run con-

currently. The court held such sentences were insufficient basis for deportation. The same result followed in *Guerricia* v. *Reimer*, 79 F. 2d 1019 (1935), where the Court held against deportation of an alien who had been convicted of the commission of two separate and distinct robberies and one assault with intent to kill, all the victims being different persons, and the crimes having been committed over a period of about two weeks, being sentenced to terms of imprisonment of more than one year in each case.

In 1931, the Ninth Circuit Court of Appeals handed down, in the *Nishimoto* case, 44 F. 2d 304, the most broad interpretation of the phrase "sentenced more than once" which had been rendered up to that time, holding that the commission of more than one crime involving moral turpitude, conviction thereof, and imposition of *separate sentences*, whether to run concurrently or consecutively, met the test of the deportation statute. It is this interpretation which is applied in the instant case despite the serious doubt of the minority, concurring opinion that Congress intended the deportation statute to be applied in such a case as the instant one. This suggests that even the lower court's prior ruling may not support the decision in this case.

Also in 1931, the Fourth Circuit Court of Appeals confronted the problem in the case of *Tassari* v. *Schmucker*, 53 F. 2d 570. In that case there were two separate crimes, the second committed while the alien was released on bond on the first charge, two separate indictments, two separate trials at different times and two separate sen-

tences at different times. The Court endeavored to reconcile the decisions in the cases of *Mignozzi*, 51 F. 2d 1019; *Johnson*, 28 F. 2d 810, and *Nishimoto*, 44 F. 2d 304, and said (p. 571):

> In our opinion the correct principle to be deduced from these decisions is that where the crimes are separate and distinct, and there is a separate sentence for each offense, it must be held within the meaning of the act that the alien has been "sentenced more than once" even though the separate sentences are made to run concurrently and not consecutively. * * * As the crimes were *separate and distinct and successive, and the sentences likewise separate and distinct*, the alien is clearly brought within both the language and the intent of the statute. (Emphasis supplied.)

In that case the Court also pointed out (p. 573-4) that Tassari had been convicted of other crimes on at least nine occasions and observed: "If such an *habitual criminal* is not subject to deportation it would seem that the purpose of the act would be ineffective." (Emphasis supplied.) It will be seen that this language is of importance to the problem, in regard to the *purpose* of the statute.

The First Circuit Court of Appeals decided the case of *Clark* v. *Orabona*, 59 F. 2d 187, in 1932, and held that the shootings of two persons by the alien on the same occasion, followed by two separate indictments, conviction and two separate sentences at widely separated times, brought him within the deportation statute. The second sentence came *seven years after* the first, and imposed a term of imprisonment of seven years upon one indictment after the defendant had served a term

of imprisonment of four and one-half years to which he was sentenced on the first indictment. It is interesting that this holding reversed the District Court decision, 53 F. 2d 101, 102-3, wherein Letts, D. J., said:

> It is wholly consistent with the holding in both the Johnson and Nishimoto cases to interpret the purpose of Congress as expressed in the statute as being to authorize the deportation of persons who have been in this country more than five years only when on two separate occasions after entry they shall, in their behavior, have exhibited a baseness of character amounting to moral turpitude resulting in consequences sufficiently serious to warrant the imposition of the substantial sentences mentioned. I do not believe it was the intent to authorize the Secretary of Labor to order deported an individual such as the petitioner in this case, who, in a single episode, a sihgle mental derangement having a multiple result, had exposed himself, through the niceties and formalities of criminal procedure, to two specific charges.

The Circuit Court, however (p. 189), pointed out that there was no evidence that the offenses were not the result of "separate voluntary acts," and that the two sentences, imposed at different times, brought the alien within the provisions of the statute "if the literal interpretation of the statute is to govern." This Court denied a petition for certiorari, 287 U. S. 629.

In the following year (1933) the Circuit Court of Appeals, Fifth Circuit, considered the problem in *Wallis* v. *Tecchio*, 65 F. 2d 250, wherein the alien Tecchio had committed at least four counter-

feiting offenses within a period of several weeks, and had been convicted on four counts of one indictment. The sentence on the first two counts was to a term of imprisonment for two years, on each, the sentences to run consecutively; and on the remaining two counts, for two years, to run concurrently with the first two. The Circuit Court held (p. 252):

> Congress has here in the same provision used four expressions, crime, conviction, term of imprisonment and sentence with evident appreciation of their several proper meanings. Deportation is not rested on the mere commission of crime; but there must be conviction in this country, its courts must be troubled and the alien here publicly scandalized by sentence, and his punishment made as severe as a year in the penitentiary. After five years' residence his ties here may not be broken unless he has thus been "sentenced more than once." The language is not "sentenced for two crimes" or for "two terms in the penitentiary," but "sentenced more than one time." The difference between a sentencing and the terms of imprisonment which may be imposed by it is plain. The alien is sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again. It is no fair rendering of the words to say that a sentencing at the same time for two crimes suffices, or that to receive two terms of imprisonment imposed by the same sentence is to be sentenced more than once. One must have burdened the country's courts with his prosecution, and have

been publicly branded as a criminal by his sentence on at least two occasions. It may be within the choice of the prosecutors to so mould the proceedings as to make two separate prosecutions out of a situation, or to consolidate them into one; but should the former course be oppressively followed, the judge may defeat it by the power given him in the statute to veto deportation.

It will be noted that in the instant case, the Court referred to the decision of the District Court, Northern District of Georgia, in *Opolich* v. *Fluckey*, 47 F. 2d 950, where, after conviction on a four count counterfeiting indictment, there had been sentence to a fine and two years in the penitentiary, service "to be concurrent," without specifying which counts the sentence was upon. The Court, in granting the petition for writ of habeas corpus, said that "Congress had in mind what are commonly called 'repeaters,' that is to say, persons who commit a crime and are sentenced, and then commit another and are sentenced again."

It is of some significance to note that the District Court, District of New Jersey, in the unreported case of *LaGrutta* v. *Hughes* (1938) held that an alien had not been "sentenced more than once" even though he had been charged in separate indictments with, and convicted of, sex offenses committed against different little girls, on at least two distinct and separate occasions; there was also a separate sentence on each indictment to a term of imprisonment of from three to five years, the second to run concurrently with the first. A similar result was reached in a similar unreported case, *Babac* v. *Perkins*, D.C.W.D. Pa. (Jan. 1936).

Respondent argued in opposition to granting the petition (Br. 7) that the trial judge "could not impose cumulative sentences," and that only one life sentence could be obtained by the State; the lower Court did not think so, as demonstrated in its opinion (pp. 25-26). Nor can it be agreed that it would be impossible to effect deportation for two murders nor that it would be unusual for a prosecutor to separately prosecute two "airtight capital cases;" if this latter statement were accurate then a convict serving a life term would be practically immune from prosecution on a homicide charge. A practical view—of the very facts in this case—is that under most systems of rehabilitation the question of the parole of the prisoner may be taken up far short of completion of service of his term; after about fifteen years, here. Otherwise, the whole proposition involved in this case would be moot—as the convict is required by the deportation statute to serve out his term before the warrant of deportation may be executed.

It must be observed that in the cases of *Mignozzi*, 51 F. 2d 1019; *Turco*, 58 F. 2d 1087; *Guerricia*, 79 F. 2d 1019, and *Tecchio*, 65 F. 2d 250, the Government did not petition this Court to grant writs of certiorari to review the decisions of the Circuit Courts. And in the cases of *Opolich*, 47 F. 2d 950, and *La Grutta* and *Babac* (both unreported) no appeals were taken by the Government to the Circuit Courts of Appeal, even though all those rulings reached results at direct odds with that in the *Orabona case*, 59 F. 2d 187. It may be concluded that the then Solicitors-General agreed,

then, with the conclusions reached in those cases and did not wish to have those decisions disturbed.

In fact, after the decision in the *Tecchio* case, 65 F .2d 250, the Government abandoned its right to seek review of that decision, because a new administrative interpretation of the law, consistent with the ruling in the *Tecchio* case became the new policy in the administrative decision of all deportation cases falling under the section in question. This policy was to the effect that there must have been at least two separate and distinct crimes committed, two separate and distinct prosecutions therefor and two separate and distinct sentences, at different times, as prerequisites to an order of deportation.

Moreover, following the decision in the *Tecchio* case, administrative rulings in some deportation cases held that there must have been service of the term of imprisonment for the first crime before the second crime was committed, or that the second crime must have been committed, after sentence for the first, before the condition laid down by the statute could be met. Further, deportation was not ordered where, by a single course of criminal conduct; an alien's offenses were multiplied into numerous counts of an indictment, or different indictments, with separate sentences on counts or indictments at one time.

Such administrative interpretations were followed from about the time of decision of the *Tecchio* case, 65 F. 2d 250 (or about 1933), until about 1944. The administrative interpretation of the statute over so long a period of time, and con-

sistent application of that interpretation to cases arising during that period, is entitled to great weight in determining the meaning of the statute. It is fair to speculate that had this case arisen in 1935, rather than 1925, the petitioner's deportation proceedings would have been cancelled by administrative decision.

To summarize, in this case we have two crimes committed on the same occasion, apparently as a result of the same impulse, followed by one indictment (in two counts), one trial, and one sentence. It is immaterial to the petitioner whether the test of deportability be the number of sentences more than one, the "duplication of penalties," crimes which were "separate and distinct and successive" and "sentences likewise separate and distinct," two separate sentences at widely separate times, or the requirement that the alien be tried and "sentenced more than one time;" for it is apparent that had any or all of these tests been applied to his case, the writ of habeas corpus must have been granted. Indeed, it seems clear that had petitioner's case arisen in any one of the other Circuits which have passed upon the question, his release would have followed. This overwhelming weight of authority in petitioner's favor is a demonstration of the error of the extreme position of the lower court, and definitely supports the contention that the deportation warrant is without lawful sanction.

Point 2

THE STATUTE IS AMBIGUOUS, AND THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS DID NOT INTEND THAT DEPORTATION SHOULD FOLLOW FROM A SENTENCE IMPOSED IN THE CIRCUMSTANCES OF THIS CASE.

The fact of the quite wide divergence of judicial opinion—inherent in the very concurring, minority opinion of the court below in this case—and of administrative action, demonstrates that the statute is so ambiguously worded as to warrant resort to the reports of the proceedings in the Congress prior to its passage, as the index of legislative intent. The portion of the section directly in discussion was a provision which was added, as an amendment, to the bill while it was under debate on the floor of the House of Representatives (Cong. Rec., Vol. 53, pp. 5167, 5168). Perhaps the principal and most material phase of the debate in this connection is the statement of Representative Burnett, who was in charge of the bill on the floor of the House, and who spoke in favor of the amendment, which had been proposed by Representative Sabath:

> But the suggestion was then made by the gentleman from Illinois (Mr. Sabath) that those *who committed a second crime* involving moral turpitude showed then a *criminal heart and a criminal tendency*, and they should *then* be deported; and the committee unanimously agreed with the gentleman that that ought to be done. The police commissioner wrote me a letter in which he stated that upon examinations of the prison records he found that there were a great many of those cases, *of men who*

served out their sentences and then renewed their careers of crime. (Emphasis supplied.)

Speaking of his own amendment, Representative Sabath said:

> My amendment provides that after a *second offense* committed by such an alien, or where he has been for the *second time convicted*, the five year limitation should not apply. In other words, even though he may have been residing in the United States for five years or more, if he is *for the second time convicted* of any offense or crime involving moral turpitude, he should be deported. (Emphasis supplied)

The most cursory analysis of these statements shows that the Representatives responsible for the introduction of the amendment and the passage of the bill as amended clearly had in mind that the alien who was *a second offender* should be deported—aliens who committed "a second crime" after having committed the first, who were confirmed criminals, who served out the first sentence and then "renewed their careers of crime" and were for "a second time convicted."

Moreover, the Senate adopted the view of the House, for in Report No. 352, 64th Congress, 1st Sess., p. 15, the Senate referred to the proceedings in the House as reported in the Congressional Record (wherein the amendment had been made and the statements of its proponents, interpreting it, had been reported), and referred to the provisions of the amendment as "intended to reach the alien who after entry shows himself to be a criminal of the *confirmed type*, such aliens to be deported without limitation on the length of time

after entry when they commit *a second* serious offense." Again is carried through the idea of the commission of a *first* offense, the service of sentence, freedom and then the *second* offense and punishment, with deportation added to rid the country of the "confirmed" criminal, the "repeater."

The judicial interpretations which most nearly square with the Congressional intent, as plainly indicated by all of the statements, made in either House or Senate relative to the amended section, are those of the Circuit Court in the case of *Wallis* v. *Tecchio*, 65 F. 2d 250; and the District Court in the case of *Opolich* v. *Fluckey*, 47 F. 2d 950. Certain of the expressions in the *Tassari* case, 53 F. 2d 570, and, of course, that of *Mignozzi*, 51 F. 2d 1019, are close to the mark. The former administrative interpretation, which followed the principles laid down in the Tecchio case, coincided with the views of those in the Congress responsible for the enactment of the provision in question.

As recently as November 10, 1947, this Court declared, as it has often in substance repeated:

> Deportation can be the equivalent of banishment or exile. See Bridges v. Wixon, 326 U. S. 135, 147, 89 L. Ed. 2103, 2111, 65 S. Ct. 1443. The stakes are indeed high and momentous for the alien who has acquired residence here.

The alien here concerned has not seen his native country since he was in his middle teens, and has lived for the past thirty-seven years in the United States. Deportation to China under present conditions would most certainly deprive him "of all

that makes life worth living," *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, 42 S. Ct. 492, 66 L. Ed. 938.

CONCLUSION

It is respectfully submitted that this Court should reverse the decision herein of the Circuit Court of Appeals for the Ninth Circuit, and order that the petition for habeas corpus be granted.

LAMBERT O'DONNELL,
WILLIAM J. CHOW,
THOMAS C. LYNCH,
Counsel for Petitioner.

Dated, Washington, D. C.
December 17, 1947.

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No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1947

FONG HAW TAN, PETITIONER

v.

ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals and the concurring opinion (R. 24–29) are reported at 162 F. 2d 663.

JURISDICTION

The judgment of the circuit court of appeals was entered June 25, 1947 (R. 30). The petition for a writ of certiorari was filed September 24, 1947. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an alien who receives a sentence of life imprisonment under an indictment in two counts charging him with the commission of two murders, the jury having returned a separate verdict of guilty on each count and fixed the punishment in each verdict at life imprisonment, is "sentenced more than once" to imprisonment for one year or more because of conviction of a crime involving moral turpitude, within the meaning of Section 19 (a) of the Immigration Act of 1917, whereby such an alien is subject to deportation.

STATUTE INVOLVED

Section 19 (a) of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended (8 U. S. C. 155 (a)), provides in pertinent part:

> SEC. 19 (a) * * * except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Attorney General,

be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; * * *.

STATEMENT

On May 10, 1946, petitioner, an alien resident of the United States, filed in the District Court of the United States for the Northern District of California a petition for a writ of habeas corpus (R. 2–6) alleging that he was admitted into the United States for permanent residence in August 1910 and had thereafter continuously resided in this country; that he was being detained in respondent's custody under an order of deportation issued by the Attorney General in November 1941 charging that he was subject to deportation under Section 19 (a) of the Immigration Act of 1917, *supra,* in that he had been, after May 1, 1917, sentenced more than once to a term of imprisonment of one year or more because of conviction in this country of a crime involving moral turpitude, to

wit, murder; that the only time he had ever been sentenced to imprisonment because of conviction in this country of a crime involving moral turpitude was on July 21, 1925, when he was sentenced in Fresno, California, to imprisonment in the State penitentiary for the crime of murder alleged to have been committed on May 22, 1925, from which term of imprisonment he was later paroled; and that consequently the Attorney General had no power under the Immigration Act to order him deported.

An order to show cause was issued (R. 6–7) and a return made (R. 7–8). Respondent attached to his return, as Exhibit A, a copy of the warrant of deportation and the entire proceedings pertaining thereto. It appears from respondent's Exhibit A[1] that on June 11, 1925, an indictment in two counts was filed in the Superior Court of Fresno County, California, charging that on or about May 22, 1925, in Fresno County, petitioner murdered one Lai Quan (count 1) and that on or about the same date, also in Fresno County, petitioner murdered one Ong Kim (count 2). Following a trial by jury, petitioner was found guilty on both counts. The jury's verdicts read:

> We, the Jury * * * find the defendant Ong Ton[2] guilty of murder of the First Degree, as charged in the First Count of

[1] This exhibit is not contained in the printed record, but is filed as an original exhibit with the Clerk of this Court.

[2] It appears from Exhibit A that "Ong Ton" was an alias of petitioner.

> the Indictment, and fix the punishment at life imprisonment * * *.[2]
>
> We, the Jury * * * find the defendant, Ong Ton Guilty of Murder in the First Degree, as charged in the Second Count of the Indictment, and fix his punishment at life imprisonment * * *.

The judgment and sentence of the court read:

> That whereas, The said Ong Ton having been convicted of the crime of Murder of the First Degree on two separate counts
>
> It is Therefore Ordered, Adjudged and Decreed, That the said Ong Ton be punished by imprisonment in the State Prison of the State of California at San Quentin for a period of his natural life, or until legally discharged.

On August 12, 1946, the district court denied the petition for habeas corpus "Upon the authority of Nishimoto v. Nagle, 44 Fed. 2d 304, Cir. 9" (R. 8). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed (R. 30), one judge stating in a concurring opinion that he had "serious doubts whether Congress intended the deportation statute to apply to a case like this," and that he concurred in the affirmance "only for the reason that this court, in Nishimoto v. Nagle, 44 F. 2d 304, has already decided the point, and

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[2] Section 190 of the California Penal Code provides that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same * * *."

should, until higher authority has spoken, follow that decision" (R. 29).

ARGUMENT

Petitioner was convicted of two murders. There is no showing that both murders grew out of the same incident. The California Penal Code provides that upon a conviction of murder the sentence shall be one of death or life imprisonment at the discretion of the jury. The jury fixed life imprisonment as the punishment for each murder. A life sentence was accordingly imposed by the trial court on the verdicts of the jury. We submit that petitioner was sentenced for each murder and therefore was "sentenced more than once," as provided in Section 19 (a) of the Immigration Act of 1917, as amended.

It cannot be denied that the following decisions in the circuit courts of appeals decide nothing which is in conflict with the decision below, and hence do not require discussion: *Johnson* v. *United States,* 28 F. 2d 810 (C. C. A. 2); *Nishimoto* v. *Nagle,* 44 F. 2d 304 (C. C. A. 9); *Tassari* v. *Schmucker,* 53 F. 2d 570 (C. C. A. 4); *Clark* v. *Orabona,* 59 F. 2d 187 (C. C. A. 1), certiorari denied, 287 U. S. 629. The only decisions which require analysis are those of the Second Circuit in *United States* v. *Day,* 51 F. 2d 1019, and the Fifth Circuit in *Wallis* v. *Tecchio,* 65 F. 2d 250. These decisions, it is true, are in conflict with decisions in other circuits, but

the reasoning which underlay them, and which engendered conflict, can have no application in a case such as the instant one.

In the *Day* case, involving concurrent sentences for counterfeiting violations, the Second Circuit distinguished its prior decision in the *Johnson* case, involving consecutive sentences for several arsons prosecuted in a single information, and held that it could not agree with the decision of the Ninth Circuit in the *Nishimoto* case, which also dealt with concurrent sentences in bad check cases.[4] It reasoned that there was not more than one sentencing because the trial judge by his concurrent sentences, although in a sense imposing a separate sentence on each count, elected, in essence, to treat the crimes as but really one offense.[5] In the instant case, obviously, the trial judge could not impose cumulative sentences because, as the court below said (R. 26), "In the nature of things [a life] sentence cannot be served twice."

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[4] The court referred to a contrary district court holding in *Opolich* v. *Fluckey*, 47 F. 2d 950 (N. D. Ga.).

[5] The Second Circuit decided two later cases *per curiam* on the authority of the *Day* case (*United States ex rel. Turco* v. *Commissioner*, 58 F. 2d 1087; *United States ex rel. Guerricia* v. *Reimer*, 79 F. 2d 1019). The facts are not recited in the decisions but, as appears from the petition for a writ of certiorari, they did not involve murder convictions (Pet. 9, 11–12). In the *Guerricia* case the court stated that the majority of the court as then constituted did not agree with the rule announced in the *Day* case, but nevertheless reversed the order involved "on that authority."

In the *Wallis* case, which involved consecutive and concurrent sentences rendered at the same time for counterfeiting violations, the Fifth Circuit attempted what it called an "independent construction." It said (p. 252):

> It is no fair rendering of the words [of the statute] to say that a sentencing at the same time for two crimes suffices, or that to receive two terms of imprisonment imposed by the same sentence is to be sentenced more than once. One must have burdened the country's courts with his prosecution, and have been publicly branded as a criminal by his sentence on at least two occasions. It may be within the choice of the prosecutor to so mould the proceedings as to make two separate prosecutions out of a situation, or to consolidate them into one; but should the former course be oppressively followed, the judge may defeat it by the power given him in the statute to veto deportation. On the record before us we think Tecchio has been sentenced but once, although he was then given several terms of imprisonment.

But such reasoning, whether good or bad in the case in which it was applied, has no application in a case such as the present one. The State in this case could only obtain one life sentence, no matter how many murders were committed or prosecutions instituted. For this reason there was only one prosecution and one general sentence to life imprisonment. Deportation could never

be accomplished in the face of two airtight capital cases unless the prosecutor went through the unusual procedure of separately prosecuting each.

The deportation provision in question was designed to rid the country of those aliens who had been sentenced for two serious, distinct breaches of our criminal laws. The conflicting views in the cases cited above do not relate to a twice-convicted murderer who, moreover, has not been shown to have committed the murders as part of a single incident. Those cases are concerned with situations where the effort to apply the Congressional purpose to lesser crimes has become entangled with forms of sentencing, multiplication of offenses, election to prosecute several offenses at one time or in separate proceedings, and analogous impedimenta.

CONCLUSION

For the reasons indicated, we respectfully submit that the petition for a writ of certiorari should be denied.

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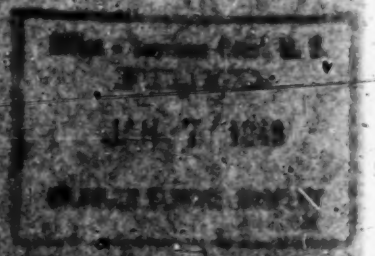

No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1947

FONG HAW TAN, PETITIONER,

v.

ARTHUR J. PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the circuit court of appeals and the concurring opinion (R. 24–29) are reported at 162 F. 2d 663.

JURISDICTION

The judgment of the circuit court of appeals was entered June 25, 1947 (R. 30). The petition for a writ of certiorari was filed September 24, 1947, and was granted November 10, 1947 (R.

32). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an alien who receives a sentence of life imprisonment under an indictment in two counts charging him with the commission of two murders, the jury having returned a separate verdict of guilty on each count and fixed the punishment in each verdict at life imprisonment, is "sentenced more than once" to imprisonment for one year or more because of conviction of a crime involving moral turpitude, within the meaning of Section 19 (a) of the Immigration Act of 1917, whereby such an alien is subject to deportation.

STATUTE INVOLVED

Section 19 (a) of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended (8 U. S. C. 155 (a)), provides in pertinent part:

> SEC. 19 (a) * * * except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall,

upon the warrant of the Attorney General, be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; * * * *.

STATEMENT

On May 10, 1946, petitioner, an alien resident of the United States, filed in the District Court of the United States for the Northern District of California a petition for a writ of habeas corpus (R. 2–6) alleging that he was admitted into the United States for permanent residence in August 1910 and had thereafter continuously resided in this country; that he was being detained in custody under an order of deportation issued by the Attorney General in November 1941 charging that he was subject to deportation under Section 19 (a) of the Immigration Act of 1917, *supra*, in that he had been, after May 1, 1917, sentenced more than once to a term of imprisonment of one year or more because of conviction in this country of a crime involving

moral turpitude, to wit, murder; that the only time he had ever been sentenced to imprisonment because of conviction in this country of a crime involving moral turpitude was on July 21, 1925, when he was sentenced in Fresno, California, to imprisonment in the State penitentiary for the crime of murder alleged to have been committed on May 22, 1925, from which term of imprisonment he was later paroled; and that consequently the Attorney General had no power under the Immigration Act to order him deported.

An order to show cause was issued (R. 6–7) and a return made (R. 7–8). Respondent attached to his return, as Exhibit A, a copy of the warrant of deportation and the entire proceedings pertaining thereto.[1]

It appears from respondent's Exhibit A that on June 11, 1925, an indictment in two counts was filed in the Superior Court of Fresno County, California, charging that on or about May 22, 1925, in Fresno County, petitioner murdered one Lai Quan (count 1) and that on or about the same date, also in Fresno County, petitioner murdered one Ong Kim (count 2). Following a trial by jury, petitioner was found guilty on both counts. The jury's verdict read:

> We, the Jury * * * find the defendant, Ong Ton[2] guilty of murder in the First

[1] This exhibit is not contained in the printed record, but is filed as an original exhibit with the Clerk of this Court.

[2] It appears from Exhibit A that "Ong Ton" was an alias of petitioner.

> Degree, as charged in the First Count of the Indictment, and fix the punishment at life imprisonment * * *.
>
> We, the Jury * * * find the defendant, Ong Ton Guilty of Murder in the First Degree, as charged in the Second Count of the Indictment, and fix his punishment at life imprisonment * * *.[3]

The judgment and sentence of the court read:

> That whereas, The said Ong Ton having been convicted of the crime of Murder of the First Degree on two separate counts
>
> It is Therefore Ordered, Adjudged and Decreed, That the said Ong Ton be punished by imprisonment in the State Prison of the State of California at San Quentin for a period of his natural life, or until legally discharged.

While petitioner was incarcerated in San Quentin a hearing was held before an immigration inspector to determine whether petitioner was subject to deportation. Certified copies of the indictment, verdict, and sentence were produced at the hearing. Petitioner stated that he did not wish to be represented by an attorney and that he was not resisting deportation. The inspector recommended that petitioner be deported. That recommendation was approved by the Second Assistant Secretary of Labor, and on March 20,

[3] Section 190 of the California Penal Code provides that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same * * *."

1926, a warrant of deportation was issued directing petitioner's deportation to China when he was released from imprisonment. On November 14, 1941, the Department of Justice, to which the Immigration and Naturalization Service had been transferred, issued an amended warrant of deportation in substantially the same terms.

Petitioner was released from San Quentin in February 1942 into the custody of the Immigration Service. Since deportation to China was then impossible, he was released on his own recognizance, and remained at large until 1946, when he was again taken into custody for deportation to China. Thereafter he filed the petition for habeas corpus challenging the validity of his detention.

On August 12, 1946, the district court denied the petition for habeas corpus "Upon the authority of *Nishimoto* v. *Nagle*, 44 Fed. 2d 304, Cir. 9" (R. 8). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed (R. 24–30), one judge stating in a concurring opinion that he had "serious doubts whether Congress intended the deportation statute to apply to a case like this," and that he concurred in the affirmance "only for the reason that this court, in *Nishimoto* v. *Nagle*, 44 F. 2d 304, has already decided the point, and should, until higher authority has spoken, follow that decision" (R. 29).

SUMMARY OF ARGUMENT

I. Section 19 (*a*) of the *Immigration* Act of 1917 requires the deportation of an alien who is "sentenced more than once" to imprisonment for for a term of one year or more for a crime involving moral turpitude. As applied to the many different factual situations which may arise under the normal practice of alleging several offenses in one indictment or trying several different indictments at the same time, the phrase "sentenced more than once" is so ambiguous that a different interpretation has been given to it in every circuit which has been called upon to pass upon the question. Neither the legislative history nor the administrative construction are of much aid in dispelling the confusion.

A. *The Judicial Interpretation.*—The Ninth Circuit Court of Appeals takes the view that conviction for any two crimes brings an alien within the purview of the statute regardless of the nature of the sentences imposed or the relation of the offenses to each other. *Nishimoto* v. *Nagle,* 44 F. 2d 304.

The Second Circuit Court of Appeals takes the view that an alien who has been given consecutive sentences is sentenced more than once, whereas an alien who is given concurrent sentences is sentenced only once, even though the crimes may be distinct. *Johnson* v. *United States,* 28 F. 2d 810; *United States ex rel. Mignozzi* v. *Day,* 51 F. 2d 1019.

The Fourth Circuit Court of Appeals takes the view that an alien who commits two crimes which arise out of separate transactions is deportable whether or not the sentences imposed are to run concurrently or consecutively. *Tassari* v. *Schmucker*, 53 F. 2d 570.

The Fifth Circuit Court of Appeals holds that sentences must have been imposed on two different occasions, and that the imposition of two sentences at different times is sufficient regardless of whether the sentences are to run concurrently or consecutively. *Wallis* v. *Tecchio*, 65 F. 2d 250.

B. *The Legislative History.*—The legislative history of the statute is not very enlightening. The portion of the statute involved was introduced as an amendment on the floor of the House, and the discussion which followed indicates that Congress did not have in mind the special problems arising out of multiple court indictments or simultaneous trials or pleas of guilty to separate indictments. The legislative history does show, however, an intention to deport "confirmed" criminals and an assimilation of the class of confirmed criminals, with persons who had been convicted of a second crime involving moral turpitude.

C. *The Administrative Construction.*—There is no settled administrative construction of the statute which can be deemed controlling. While, for a time, the Immigration Service did accept the decision of the Fifth Circuit in *Wallis* v.

Teechio, 65 F. 2d 250, the files of the Department reveal that the failure to seek review of that decision was in large part influenced by the expectation that legislative changes would obviate the problem.

II. In view of the judicial and administrative confusion, the proper construction of the statute becomes a matter for *de novo* consideration by this Court.

Administratively, the easiest construction to follow is that of the Ninth Circuit that conviction for any two offenses is sufficient regardless of the nature of the crimes or the form of sentence. And since a person sentenced on separate counts, whether concurrently, consecutively or generally, is sentenced for more than one crime, and thus sentenced more than once, this construction comes within the literal language of the statute. However, as applied to situations where one transaction forms the basis of several counts of an indictment, such an interpretation does not appear to be in accord with the Congressional purpose as revealed by the meager legislative history of the statute.

On the other hand, taking an extremely literal view of the word "sentence," it can be said with the Circuit Court of Appeals for the Fifth Circuit that a person is not sentenced more than once unless there are two separate acts of sentencing. This view, however, would allow an alien who commits two wholly unrelated offenses

to escape deportation, and require the deportation of a person who was separately tried for two crimes arising out of one transaction. It thus does not appear to be in accord with the Congressional purpose.

The Second Circuit's view that the number of terms of imprisonment imposed is controlling seems to us even more unsatisfactory, since sentencing procedure is not so standardized that it can be said that the decision of one judge who gives long concurrent terms on several counts reflects a different view of the nature of the crime from that of another judge who gives shorter consecutive sentences on several counts.

The view that seems to us most reasonably to accord with both the language of the statute and its purpose is that an alien who is convicted of crimes arising out of two distinct transactions is sentenced more than once for the purpose of deportation, regardless of the form the sentence may take. This interpretation will present administrative difficulties since the question whether two transactions are or are not distinct will undoubtedly be difficult to determine, as this very case shows. Nevertheless, it seems to us to be the view most nearly in accord with the Congressional purpose to deport persons who by engaging in two separate and distinct criminal transactions reveal that they are "criminals at heart."

III. If the construction which we suggest is the proper one, then it becomes important to deter-

mine whether petitioner's conviction for two murders on or about the same day represented in reality one transaction or two.

There is sound basis, we think, for taking the view that each intentional attack upon a separate person is a separate criminal act, different in character from a transaction essentially single, such as the making and possession of a counterfeit plate. In that view, the judgment below should be affirmed.

If, however, this Court feels that even separate murders committed as part of one quarrel should be deemed one crime for the purpose of deportation, the record in this case offers an insufficient basis upon which to determine petitioner's deportability. At the hearing preceding the deportation order, no evidence was introduced to show whether the crimes for which petitioner was convicted were or were not separate and distinct. Although, at the hearing, petitioner stated that he did not resist deportation, the Government has no desire to hold him to that waiver, if he is not in fact a person subject to deportation. Hence, if this Court should hold that the fact of two murders is not in itself sufficient to establish distinctivity of offenses, we suggest that the cause be remanded to the immigration authorities for further hearing on the question of petitioner's deportability.

ARGUMENT

I

THE PROBLEM OF APPLYING THE STATUTORY PHRASE "SENTENCED MORE THAN ONCE" TO MULTIPLE COUNT INDICTMENTS AND JOINT TRIALS HAS CREATED A CONFUSED SITUATION WHICH IS NOT DISPELLED BY THE LEGISLATIVE HISTORY OR THE ADMINISTRATIVE CONSTRUCTION

Section 19 (a) of the Immigration Act of 1917 requires the deportation of an alien "who is sentenced more than once" to imprisonment for a term of one year or more for a crime involving moral turpitude. The phrase "sentenced more than once" has a deceptive simplicity which resolves into ambiguity as soon as an attempt is made to apply it to the many different factual situations which may arise under the normal practice of alleging several offenses in one indictment or trying several different indictments at the same time. Is a person who receives consecutive sentences of one year on two counts, both of which are based on the same transaction, sentenced more than once? Is the situation different if he receives concurrent sentences of two years on each count? Is a person who receives concurrent sentences on the same day on pleas of guilty to two indictments, based on wholly unrelated offenses, sentenced more than once? Is the situation different if the pleas are made and sentence pronounced on separate days? These and similar problems have troubled the courts with the result that the phrase "sentenced more than once" has

been given a different interpretation in every circuit which has been called upon to pass upon the question.

A. THE JUDICIAL INTERPRETATIONS OF THE STATUTE

1. *The view that conviction for any two crimes brings an alien within the purview of the statute regardless of the nature of the sentences imposed or the relation of the offenses to each other.*

The most stringent view of the statute is that taken by the Circuit Court of Appeals for the Ninth Circuit in *Nishimoto* v. *Nagle*, 44 F. 2d 304, on the authority of which the instant case was decided. In the *Nishimoto* case the alien pleaded guilty to issuing five different checks with intent to defraud,[4] and was sentenced on each count to imprisonment for indeterminate terms, the sentences to run concurrently. The court held that the alien was deportable under Section 19 (a), pointing out that each offense was a separate crime and that a pardon as to any one count would not affect the others. It said (44 F. 2d at p. 306):

> * * * It will be observed that the statute does not limit the power of deportation to a second conviction, but is based upon the commission of a number of offenses for which the alien has been sentenced. The form of the sentence is obviously of no consequence. The purpose

[4] The files of the Department reveal that in that case the checks were all issued on the same day.

> of Congress undoubtedly was to provide for the deportation of a man who committed more than one offense involving moral turpitude for which he had been convicted and upon which conviction and sentence has been imposed; whether the sentence runs concurrently or consecutively is entirely immaterial from the standpoint of the purpose of the law. * * *

Apparently the same view was taken by the Circuit Court of Appeals for the First Circuit in *Clark* v. *Orabona*, 59 F. 2d 187, certiorari denied, 287 U. S. 629, although under the particular facts of that case the decision is also consistent with other views discussed below. There the alien had shot and wounded two men in a poolroom brawl and was charged in two indictments with assault with intent to murder. On his plea of *nolo contendere*, a sentence to imprisonment for 4½ years was imposed on one indictment, and imposition of sentence was deferred on the other. After his release on parole he again became involved in a shooting affair, but was acquitted on one of the two indictments returned against him as a result of that incident. The other indictment was not tried but the alien was sentenced to seven years' imprisonment on the earlier indictment on which sentence had been deferred. The district court held that the petitioner was not deportable under Section 19 (a) since the two offenses for which he had been sentenced arose out of a single incident and did not represent two successive

outbursts of moral turpitude. *Orabona* v. *Clark*, 53 F. 2d 101 (D. R. I.). The circuit court of appeals reversed, stating in its opinion that there was no evidence that the offenses for which the alien had been sentenced were not the result of separate voluntary acts. 59 F. 2d at p. 189. It should be noted, however, that in that case separate sentences had been imposed at different times to run for different periods. The decision therefore presents no clear-cut standard as to what factors should be considered controlling in determining whether an alien has been sentenced more than once.

2. *The view that the form of sentence determines the applicability of the statute regardless of the nature of the crime.*

The Circuit Court of Appeals for the Second Circuit is apparently committed to the view that the question whether an alien has been sentenced more than once depends upon the nature of the sentences imposed, i. e., that an alien who has been given consecutive sentences is sentenced more than once, whereas an alien who is given concurrent sentences is sentenced only once, even though the crimes may be distinct.

The first case to come before that circuit, and the earliest decision construing the statute in question, was *Johnson* v. *United States*, 28 F. 2d 810. There the alien had been charged in a single information with statutory arson com-

mitted at different times at different buildings, and was sentenced to consecutive sentences of one year or more on each of four counts. The district court ordered his release on the ground that there was only one act of sentencing, *United States* v. *Johnson*, 26 F. 2d 288 (D. Conn.). The circuit court of appeals reversed, stating (28 F. 2d at p. 811):

> * * * It is reasonable to differentiate between an alien who has committed a single offense and one who has repeatedly offended. There would be no reason to make the classification turn on mere formalities of criminal procedure. Whether two crimes shall be prosecuted in two counts of a single indictment or information, or in separate indictments and with separate trials, depends upon considerations of convenience and expedition in judicial administration which can have no relation whatever to a classification of aliens for deportation. Under the relator's contention the prosecuting official of Connecticut may determine, by the mere form in which he prosecutes an alien who has committed two offenses of the same character, the latter's liability to deportation. Such an intention should not be attributed to Congress unless the statutory language compels it. It clearly does not. In its natural and reasonable meaning "sentenced more than once to such a term of imprisonment" refers to the number of separate crimes for which sentences are imposed, not to the form of

the indictment or the procedure of a single trial.

A few years later the court had before it the case of *United States ex rel Mignozzi* v. *Day*, 51 F. 2d 1019, where the alien had pleaded guilty to indictments charging the possession and aiding in the passing and possession of several counterfeit bills. All the offenses were alleged to have been committed in a two-day period. The alien was sentenced generally to a term of seven years, the sentence to run concurrently. The circuit court of appeals, although expressly adhering to its former decision in the *Johnson* case, held that under the facts then before it, the alien was sentenced only once, since only one punishment had been imposed. It said (51 F. 2d at pp. 1020–1021):

> * * * We agree that each count in an indictment, like each indictment itself, is a separate charge, and that nothing is lost or gained by the form of pleading adopted. Moreover, there must be a judgment upon each charge, however pleaded, in order to dispose of it; the only judgment in a criminal case is the sentence; procedurally a general sentence to "run concurrently" is a separate sentence on each count. We are as clear, however, that although a judge does in this sense impose more than one sentence in such a situation, he sentences the convict to one term only; that, though he imposes several sentences, he exacts but one punishment; in short that he does not "more than once" sentence "to a term of

> imprisonment." It is the duplication of penalties which counts; and the test of these is practical, not procedural. * * *

The *Day* opinion also treated the offenses charged as arising out of one transaction (p. 1021) and might be explained on such ground,[5] but a later decision by the same circuit court of appeals indicates that the concurrence of sentences is the controlling factor in that circuit. *Guerricia* v. *Reimer*, 79 F. 2d 1019. The facts do not appear in the decision, but the Department files reveal that in that case the alien had pleaded guilty to four informations charging three separate robberies and one assault with intent to kill on separate days against separate persons. He was sentenced to imprisonment for eight years for each crime, the sentences to run concurrently. The court held that the alien was not deportable, stating:

> The majority of the court as now constituted differ from the rule announced in United States ex rel. Mignozzi v. Day (C. C. A.) 51 F. (2d) 1019, but reverse the order herein on that authority.

[5] Essentially the same situation was involved in *United States ex rel. Turco* v. *Commissioner*, 58 F. 2d 1087 (C. C. A. 2), in which, the Department files reveal, the alien received concurrent sentences for seven attempts to pass counterfeit money in a three-day period.

3. *The view that the nature of the crimes committed is determinative irrespective of the form of sentence.*

The Circuit Court of Appeals for the Fourth Circuit takes the view that an alien who commits two crimes which arise out of separate transactions is deportable whether or not the sentences imposed are to run concurrently or consecutively.

In *Tassari* v. *Schmucker*, 53 F. 2d 570, the alien had been arrested for entering a store with intent to steal. While at liberty on bond he was again arrested, three months later, for entering another store with like intent. He was tried, convicted and sentenced on the second charge. Two months later he was tried, convicted and sentenced on the first charge, the latter sentence to run concurrently with the first. On these facts, the Circuit Court of Appeals for the Fourth Circuit held that, even though the alien was required to serve only a single term of imprisonment, he had been sentenced more than once within the meaning of the statute. After discussing the Second and Ninth Circuit cases referred to above, the court said (53 F. 2d at p. 573):

> In our opinion the correct principle to be deduced from these decisions is that where the crimes are separate and distinct and there is a separate sentence for each offense it must be held within the meaning of the

> act that the alien has been "sentenced more than once" even though the separate sentences are made to run concurrently and not consecutively. * * *

It is, of course, true that on the facts in that case there were two separate acts of sentencing but the court seems to emphasize the separate nature of the crimes rather than the time when sentence was imposed.

4. *The view that the time of sentence governs irrespective of the nature of the crimes or the form of sentences imposed.*

The Circuit Court of Appeals for the Fifth Circuit takes a wholly different approach, holding that sentences must have been imposed at two different times, that the alien "must have burdened the country's courts with his prosecution, and have been publicly branded as a criminal by his sentence on at least two occasions." *Wallis* v. *Tecchio,* 65 F. 2d 250, 252. It held there that an alien who received consecutive sentences by one judgment on an information charging four offenses of passing and attempting to pass counterfeit money on separate occasions over an 18-day period had not been sentenced more than once, since he had appeared before the court for sentencing only once.[6]

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[6] A similar view of the statute had been taken by Judge Sibley, who wrote the opinion in *Wallis* v. *Tecchio,* as a district judge. *Opolich* v. *Fluckey,* 47 F. 2d 950 (N. D. Ga.).

B. THE LEGISLATIVE HISTORY

As might be expected from the conflict of decisions in the various circuits, the legislative history of the statute under consideration is not very enlightening. The portion of the statute here involved was introduced as an amendment on the floor of the House. 53 Cong. Rec. 5167. We have set forth in the Appendix, *infra* pp. 34–37, the parts of the debate in the House and the Committee Report in the Senate which bear on this amendment. We find it inconclusive in relation to the situations arising out of multiple counts and joint trials of multiple indictments.

Congressman Sabath, who introduced the amendment, stated: "My amendment provides that after a second offense committed by such an alien, or where he has been for the second time convicted, the five-year limitation should not apply." Later on, he stated that he had no desire "to protect a real criminal, a man who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted." Congressman Burnett, a member of the Committee which sponsored the bill, stated that he agreed with Mr. Sabath that "those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency and they should then be deported." Still later, he talked about "men who served out their sentences and then renewed their

careers of crime." Subsequently he again talked about "the commission of the second offense."

The Senate Report on the measure refers to the debate on the floor of the House and states that the amendment was designed "to reach the alien who after entry shows himself to be a criminal of the confirmed type." (See Appendix, *infra*, p. 37.)

We think it is evident that neither Senate nor House had in mind the special problems arising out of multiple count indictments or simultaneous trials or pleas of guilty to separate indictments. This history shows that the legislative intention was to deport "confirmed" criminals, but also that the legislators assimilated the class of confirmed criminals with persons who had been convicted of a second offense involving moral turpitude. Nevertheless, we believe that this history supports to some extent the interpretation of the statute which we suggest *infra*, pp. 28–29, that the sentences must arise out of separate and distinct transactions.

C. *The administrative interpretation.* As the multiplicity of decisions reflects, there is no settled administrative construction of the statute which can be deemed controlling. Petitioner suggests that the failure of the Government to seek review of the decision of the Fifth Circuit in *Wallis* v. *Tecchio*, discussed, *supra*, p. 20, reflects an administrative acquiescence in the interpretation given to the statute by that Circuit, i. e., that an alien

must twice be brought before a court for sentencing in order to be "sentenced more than once." That interpretation was accepted for a time. The files of the Department reveal, however, that the failure to seek review of that and certain other unreported decisions to which petitioner refers was in large part influenced by the expectation that legislative changes would obviate the problem. In the years from 1925 to 1938 various bills were reported out of committee which would have clarified the question under consideration, either by eliminating entirely the five-year period of limitations and thus providing for deportation on conviction for one crime, or by providing for deportation on conviction of separate crimes on separate occasions. (68th Cong., 2d session, H. R. 11796, see H. Rep. 1292; 70th Cong., 1st session, H. R. 10078, see H. Rep. 484; 70th Cong., 2d session, H. R. 16850, see H. Rep. 2397; 71st Cong., 3rd session, S. 6172, see S. Rep. 1640; H. R. 17152, see H. Rep. 2799; 73rd Cong., 2d session, 9725, see H. Rep. 1772; 74th Cong., 1st session, S. 2969, see S. Rep. 1156; H. R. 8163, see H. Rep. 1110; 75th Cong., 1st session, H. R. 6391, see H. Rep. 618; 75th Cong., 3rd session, S. Rep. 1616.) A number of these bills were considered on the floor of Congress, and in 1925 and 1937, bills eliminating the five-year period of limitations passed the House, 66 Cong. Rec. 3445; 81 Cong. Rec. 5574. Since all the bills involved other changes in the statute, the failure of Congress to act on the vari-

ous proposals is of no significance on the question at issue. It merely explains the failure of the Government to seek a resolution of the conflicting decisions at the time the conflict appeared.

II

THE CONSTRUCTION MOST IN ACCORD WITH THE LEGISLATIVE INTENT SEEMS TO US THE VIEW THAT CONVICTION FOR DISTINCT TRANSACTIONS BRINGS THE ALIEN WITHIN THE STATUTE

In view of the judicial and administrative confusion, the proper construction of the statute is, we suggest, a matter for *de novo* consideration by this Court in the light of the language of the statute and its general purpose as revealed by its meager legislative history. The solution of the problem is not simple, for all of the interpretations given to the statute by the various circuit courts of appeal present difficulties of one kind or another.

Administratively, the view of the Ninth Circuit, that conviction for any two offenses is sufficient regardless of the nature of the crimes or the form of sentence, is probably the easiest to follow. Such an interpretation does come within the literal language of the statute. A person sentenced on separate counts whether concurrently, consecutively or generally, is technically sentenced more than once, each count being a separate offense, and the sentence being applicable to each

separate offense. A concurrent or general sentence on several counts is a sentence on each count, since if all but one count should be reversed on appeal, the sentence would still stand on the remaining count. Nevertheless, a transaction essentially single, such as the making of a counterfeit plate can form the basis for several counts of an indictment. See *United States* v. *Michener*, 331 U. S. 789, where a defendant was sentenced on separate counts charging that he caused a counterfeit plate to be made and that he possessed the plate with intent to make counterfeit currency. In the light of the legislative history, we doubt that a person convicted of two crimes arising out of a single transaction was the type of person whom Congress intended to cover by the statute now in question. It is, of course, true that a harsh application of the rule could be avoided by a judge's recommendation against deportation. But this presupposes that any time an alien is convicted after trial, or, as is even more common, any time he pleads guilty to a multiple count indictment arising out of a single transaction, he must bear in mind the possibility of deportation and call the judge's attention to the fact that he is an alien. It is questionable whether an alien, commiting what in common understanding would be considered only one offense, should be held to such an awareness of his legal vulnerability.

On the other hand, taking an extremely literal view of the word "sentence," it can be said with the Circuit Court of Appeals for the Fifth Circuit that a person is not sentenced more than once unless he is twice brought before court for sentencing, i. e., unless there are two separate acts of sentencing. This view, however, is likely to prevent the deportation of the very type of criminal which Congress did have in mind, and also to require the deportation of persons not within the Congressional purview. Thus an alien may have committed two wholly unrelated offenses at widely different times, and escaped apprehension for both for several years. When finally he is apprehended, he may be tried upon or may plead guilty to both indictments. (It is important to bear in mind in this connection that the majority of criminal cases are disposed of on pleas of guilty.[7]) Unless a judge makes certain to sentence the alien on different days, the alien cannot be deported no matter how numerous his crimes or how great his guilt. On the other hand, a prosecutor may decide to try an alien separately for two crimes arising out of one transaction. Unless a judge otherwise orders, the alien would be deportable even though both crimes arose out of a single course of action.

[7] See e. g., *Annual Report of the Director of the Administrative Office of the United States Courts*, 1946, Table D4, p. 120.

The rule in the Second Circuit with which the majority of that court have expressed disagreement (see *supra,* p. 18), that the number of terms of punishment imposed is controlling seems to us even more unsatisfactory. Sentencing procedure is not so standardized that one can say that the decision of one judge to give long concurrent terms on several counts reflects a different view of the nature of the crime from that of another judge who gives shorter consecutive sentences on several counts. As the *Michener* case referred to above shows, consecutive sentences may be imposed for a crime essentially single, and as the *Guerricia* case shows (*supra,* p. 18), concurrent sentences may be imposed for crimes which are really separate. An alien may commit a crime in jail long after he had been convicted and sentenced for a prior offense. Such a person is clearly the type of criminal whom Congress intended to deport. Yet if he happens to be serving a long sentence and the judge decides to give him a concurrent sentence for the second crime, he would not, under the holding of the Second Circuit, be considered deportable. The Second Circuit's test would also preclude deportation of a person who had been convicted of any number of separate and distinct murders or other offenses punishable by life imprisonment, since the life sentences normally would run concurrently, or of any offenses in which the sentences would run

concurrently with life imprisonment. Such a person too would obviously be of the type Congress meant to have deported. Furthermore, the rationale of these cases is erroneous for it is not correct to say that a person given a concurrent sentence is not sentenced "to a term of imprisonment." If the first conviction should be reversed, the defendant would still be held in prison under the second. The statute reads "sentenced more than once" to a term of imprisonment; not, sentenced to more than one term.

The view that seems to us most reasonably to accord with both the language of the statute and its purpose, as reflected by its legislative history, is that of the Fourth Circuit Court of Appeals, holding that an alien who is convicted of two separate and distinct criminal transactions is sentenced more than once regardless of the form the sentence may take. We think it would be hypertechnical to allow the question of deportation to rest, as petitioner would apparently have it rest, on whether the pronouncement of sentence was made on one day rather than the other, or whether it took the form of one paper rather than two. A general sentence on two counts is a sentence on each, and a concurrent sentence on each count is a sentence on each. The essential question, we think, is whether the alien has committed two separate and distinct offenses, in separate transactions, for which he has been convicted and sentenced. The legislative history sug-

gests that the criminal transactions must in substance constitute separate transactions.

This interpretation will present administrative difficulties. The question whether two crimes are or are not really separate will undoubtedly at times be difficult to determine. As the court below pointed out (R. 28):

> By what formula shall the permissible lapse of time between crimes be measured? How close must the crimes be related to each other? Must they derive from the same impulse? Do separate crimes of different natures committed to clear the way for a main objective come within the conclusion? The statute answers none of these obtruding questions.

Examples of the type of problems which may occur are the *Nishimoto* and *Day* cases involving a number of attempts to pass separate fraudulent or counterfeit securities within a short period of time. This very case, which we discuss, *infra*, may present such a problem.

Nevertheless, the view that the crimes must be distinct seems to us the one most nearly in accord with the general Congressional purpose, to deport aliens who by their conduct reveal that they are "criminals at heart." It would reach the persons whom Congress apparently contemplated—the persons who by engaging in two separate and distinct criminal transactions reveal that they are "criminals at heart."

III

IF DEPORTABILITY DEPENDS ON THE COMMISSION OF SEPARATE CRIMINAL TRANSACTIONS, THE RECORD IN THIS CASE MAY BE INSUFFICIENT TO DETERMINE THAT ISSUE

If this Court approves the construction of the statute which we have suggested as the most reasonable, i. e., that an alien is "sentenced more than once" for the purpose of deportation only if he has been convicted and sentenced for two separate transactions, then it becomes important to determine whether petitioner's conviction for two murders represented in reality one transaction or two. At the hearing before the immigration inspector in 1926, the only evidence introduced consisted of copies of the indictment, conviction, and sentence. The indictment charged him with murdering two persons on or about the same day. These might have been separate acts of the same class which could properly be tried together under Section 954 of the California Penal Code, or they might have been two killings in the course of a single quarrel. The record is silent on that point.

In dealing with crimes against the person, particularly homicide, there is sound basis, we think, for taking the position that, except for the theoretical case of one bullet killing two persons, each intentional attack upon a separate person is a separate criminal act, different in character from an essentially single transaction such as the mak-

ing and possession of the same counterfeit plate. Two separate human lives are involved; two separate acts of killing are ordinarily necessary to constitute two murders even if both arise out of the same quarrel. Such was apparently the view of the Circuit Court of Appeals for the First Circuit, in the *Orabona* case discussed, *supra*, p. 14–15, and we think it is a reasonable approach to the question of distinctivity of offenses where attacks on separate individuals are involved. If that view is correct, and if the construction of the statute which we suggest is the proper one, then the order of the circuit court of appeals should be affirmed on that basis.

On the other hand, it can be argued that Congress has not seen fit to differentiate between crimes against the person, even serious crimes like murder, and other crimes involving moral turpitude. This Court may therefore feel that two murders arising out of a single transaction should not be deemed two separate and distinct crimes for the purpose of deportation. In that event, the record before this Court offers an insufficient basis upon which to determine petitioner's deportability. As noted, all that respondent's Exhibit A shows is that petitioner committed two murders on or about the same day. These may have been two separate attacks

at different times, and thus clearly separate offenses, even though the underlying grievance may have been sufficiently related to permit a joint trial. But they may also have been two killings resulting from the same quarrel. Since, as set forth in the statement, petitioner, at his hearing in 1926, stated that he was not resisting deportation, he might well be held to have waived any right to contest the sufficiency of the proof on which the deportation order rested. However, the Government has no desire to hold petitioner to the waiver thus made in 1926, when he was not represented by counsel, even though he expressly stated that he did not desire to be represented by counsel. It seems that the immigration inspector did not believe that he was obliged to find distinctivity of offenses and no evidence was produced in respect thereto. If distinctivity is a necessary element to be established for deportation purposes, then we think the Government should be held to proof of that essential element. If, therefore, this Court should hold that distinctivity of offenses must be shown, and that the fact of two murders is not in and of itself sufficient to establish such distinctivity, we suggest that the cause be remanded to the im-

migration authorities for further hearing on the question of petitioner's liability to deportation.*

Respectfully submitted.

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JANUARY 1948.

* If this Court adopts the construction of the statute given to it by the court below, then of course, the judgment should be affirmed. If the view of the Fifth Circuit that there must be separate acts of sentencing is correct, then clearly no grounds exist for petitioner's deportation. If the Second Circuit's view, that the concurrence of sentence is a controlling factor, is adopted, then the question would arise whether a general sentence for life imprisonment on several counts where life imprisonment is mandatory in the absence of the death penalty, comes within the rationale of those cases. It would indeed be anomalous to hold that the pronouncement of a general sentence of mandatory life imprisonment on two counts, instead of two separate sentences of life imprisonment on the two counts, shows a determination by the judge that the crimes were single rather than separate.

APPENDIX

The following discussion on the floor of the House of Representatives concerning H. R. 10384, which became the Immigration Act of 1917, is reported at 53 Cong. Rec. 5167–5168:

> Mr. SABATH. Mr. Chairman, I desire to offer the following amendment.
>
> The CHAIRMAN. The gentleman from Illinois offers an amendment, which the Clerk will report.
>
> The Clerk read as follows:
>
> On page 40, line 1, change the semicolon to a comma and insert "or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry."
>
> Mr. SABATH. Mr. Chairman, this is one of the sections of the bill which provides for the deportation of aliens who have actually been admitted into the United States. This particular section provides for the deportation of aliens who have committed offenses involving moral turpitude. The proviso that I desire to amend is this:
>
> Any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after the entry of this alien.
>
> My amendment provides that after a second offense committed by such an alien, or where he has been for the second time

convicted, the five-year limitation should not apply. In other words, even though he may have been residing in the United States for five years or more, if he is for the second time convicted of any offense or crime involving moral turpitude, he should be deported. The provisions in this act covering the majority of cases place the limitation at five years.

A little later on, after the adoption of this amendment, I am going to move to reduce the term from five years to three years, but I am offering this amendment to demonstrate that I have no desire to protect a real criminal, a man who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted. A man of that kind is a criminal and is not entitled to consideration on the part of any of the citizens of the United States.

* * * * *

I wish to say to my colleague from Illinois and the gentlemen of the House that I have strenuously opposed in the committee the five-year provision in this bill. I realize the hardship upon a man who has been a resident of this country for a number of years and then, through misfortune, commits an offense that might be considered a crime involving moral turpitude and is deported.

In view of the fact that the committee insisted upon doing away with any time limit whatever, in order to secure at least that five-year concession from the committee, I yielded for the time being and agreed to support the proposition that any alien who is sentenced for the second time for committing a second crime involving moral tur-

pitude should be deported, and that no time limitation should apply to him.

* * * * *

Mr. BURNETT. Mr. Chairman, I rise to support the amendment of the gentleman from Illinois [Mr. Sabath]. The gentleman is mistaken, however, in his idea that the committee wanted to remove the time limit as to those committing offenses in this country—the first offense. The police commissioner of New York was before the committee, and he showed an alarming condition in the prisons in regard to aliens who commit crimes after they come here, and he insisted that there should be no time limit as to the deportation of any of them this side of final citizenship. We believed, however, that it was a harsh rule, and every member of the committee believed that it would be a harsh rule—that if a man had come over here without any criminal record behind him being shown, and had lived an upright life here for 5 or 10 or 15 years, and then was convicted of a crime, to deport him would be unjust. Hence, we did not agree with the suggestion of the police commissioner of New York, who showed us an alarming number of records of prisoners who had come over and committed crimes after they had come here.

But the suggestion was then made by the gentlemen from Illinois [Mr. Sabath] that those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency, and they should then be deported; and the committee unanimously agreed with the gentleman that that ought to be done. The police commissioner wrote me a letter, in which he stated that upon examination of the prison records he found that there were a

great many of those cases, of men who served out their sentences and then renewed their careers of crime.

* * * * * *

Mr. BURNETT. I want to say, Mr. Chairman, that it was not the idea of the committee that there should be no limitation as to the first conviction, but on the commission of the second offense, showing that the man was really a criminal at heart, we believed that he ought to be deported.

Senate Report No. 352, 64th Cong., 1st sess., accompanying H. R. 10384, states in part as follows (pp. 14–15):

SECTION 19

* * * * * *

When the act was passed as H. R. 6060 it contained a new provision (still retained, p. 43, lines 1–6) for the deportation of aliens who commit serious crimes within five years after entry, the courts pronouncing sentence being authorized to recommend in any instance that deportations shall not occur (p. 44, line 20, to p. 45, line 2). As the act now stands the House has added, at the suggestion of its committee (vol. 53, Congressional Record, pp. 5932–5933),[1] a provision intended to reach the alien who after entry shows himself to be a criminal of the confirmed type, such aliens to be deported without limitation on the length of time after entry when they commit a second serious offense (p. 43, lines 6–9); * * *.

[1] These page references are erroneous. The correct pages are 53 Cong. Rec. 5167–5168.

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SUPREME COURT OF THE UNITED STATES

No. 370.—October Term, 1947.

Fong Haw Tan, Petitioner,
v.
Arthur J. Phelan, Acting District Director, Immigration and Naturalization Service, Port of San Francisco, California.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 2, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

An alien "who is sentenced more than once" to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed after his entry shall, with exceptions not material here, be deported. Section 19 (a)[1] of the Immi-

[1] Section 19 (a) so far as material here provides:

". . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Attorney General, be taken into custody and deported . . . . The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after termination of his imprisonment . . . ."

gration Act of February 5, 1917, 39 Stat. 889, as amended 54 Stat. 671, 8 U. S. C. § 155 (a). It appears that petitioner, a native of China, was convicted of murder under each of two counts of an indictment, one count charging the murder of one Lai Quan, the other charging the murder on or about the same date of one Ong Kim.[2] The jury fixed the punishment for each murder at life imprisonment. He was thereupon sentenced to prison for the period of his natural life by one judgment, construed by the Circuit Court of Appeals to impose that sentence on him for each of the convictions. Sometime thereafter a warrant for his deportation to China issued. Later he was paroled, released from prison, and taken into the custody of the Immigration Service. He then filed a petition for a writ of habeas corpus challenging the legality of his detention. The District Court denied the petition on the authority of *Nishimoto* v. *Nagle*, 44 F. 2d 304. The Circuit Court of Appeals affirmed. 162 F. 2d 663. The case is here on a petition for a writ of certiorari which we granted because of the contrariety of views among the circuits concerning the meaning of the statutory words, "sentenced more than once."

The Ninth Circuit view is that a conviction and sentence for more than one offense, whether at the same or different times and whether carrying concurrent or consecutive sentences, satisfy the statute. That was the position taken in *Nishimoto* v. *Nagle*, *supra*, and followed below. The Second Circuit holds that an alien who is given consecutive sentences is sentenced more than once, while an alien who is given concurrent sentences is not, even though the crimes are distinct. *Johnson* v. *United States*, 28 F. 2d 810; *United States ex rel. Mignozzi* v. *Day*, 51 F. 2d 1019. The Fourth Circuit takes the posi-

[2] Whether the two murders resulted from one act or from two does not appear.

tion that the statute is satisfied whether or not the sentences imposed run concurrently or consecutively provided that the two crimes which are committed and for which separate sentences are imposed arise out of separate transactions. *Tassari* v. *Schmucker*, 53 F. 2d 570. The Fifth Circuit takes the view that an alien is "sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again." *Wallis* v. *Tecchio*, 65 F. 2d 250, 252. That view is an adaptation of the position taken earlier by a District Court in the same circuit that Congress by this provision aimed to deport "repeaters," *viz.* "persons who commit a crime and are sentenced, and then commit another and are sentenced again." *Opolich* v. *Fluckey*, 47 F. 2d 950.

The latter is the reading we give the statute. There is a trace of that purpose found in its legislative history. Congressman Sabath who proposed the provision as an amendment said it was aimed at the alien "who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted." 53 Cong. Rec. 5167. Congressman Burnett, who was in charge of the bill on the floor of the House, gave the same emphasis when he said that the amendment proposed "that those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency, and they should then be deported." *Id.*, p. 5168. The Committee Report in the Senate put the matter into sharper focus when it stated that the provision was "intended to reach the alien who after entry shows himself to be a criminal of the confirmed type." S. Rep. No. 352, 64th Cong., 1st Sess., p. 15. Perhaps the plainest "confirmed type" of criminal is the repeater. We give expression to that view by reading

this provision of the statute to authorize deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it.

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 333 U. S. —. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Reversed.